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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 108.

THE MISSOURI PACIFIC RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED MAY 25, 1901.

(18,181.)

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a Pleas and procee lings in the United States circuit court of appeals for the eighth circuit, at the May term, 1900, of said court, begun and held at the United States court-house in the city of St. Paul, Minnesota, on the first Monday in May, to wit: the seventh day of May, A. D. 1900, before the Honorable Henry C. Caldwell, Honorable Walter H. Sanborn and Honorable Amos M. Thayer, circuit judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to wit: on the twelfth day of January, A. D. 1898, a transcript of record, pursuant to an appeal allowed by the circuit court of the United States for the district of Kansas, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, in a certain cause wherein The Missouri Pacific Railway Company was appellant, and The United States of America was appellee, which said transcript of record is in the words and figures following, to wit:

1 The United States of America to the United States of America:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit at the city of St. Louis, in the State of Missouri, sixty (60) days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the second division of the judicial district of Kansas, wherein The Missouri Pacific Railway Company is appellant and The United States of America is respondent, to show cause, if any there be, why the order and decree rendered against the said appellant in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 23rd day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

CASSIUS G. FOSTER, *Judge.*

We hereby this 23rd day of December, A. D. 1897, accept due personal service of this citation on behalf of The United States of America, appellee, and agree to enter the appearance of the United States of America in the said cause in the United States circuit court of appeals for the eighth circuit.

I. E. LAMBERT,
United States Attorney for the District of Kansas.
W. C. PERRY,
Solicitor for Appellee.

390. Citation. Filed Dec. 23, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant. } No. 390.

Bill of Complaint.

Comes now The United States of America by J. W. Ady, United States attorney for the district of Kansas, and brings this, its
2 bill of complaint, against The Missouri Pacific Railway Company, the defendant herein, and thereupon your orator complains and says:

That this action is brought by the authority of and under the direction of the Attorney General of the United States, which said authority and direction is given and made in pursuance of the request of the Interstate Commerce Commission of the United States, that the United States attorney for the district of Kansas be directed and authorized to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the interstate-commerce law against the defendant in relation to the matters hereinafter complained of.

And your orator further avers and shows unto your honors that The Missouri Pacific Railway Co., defendant herein, is a corporation organized and existing under and by virtue of the laws of the States of Missouri and Kansas, and that said defendant was at all times hereinafter mentioned, and now is a common carrier of all classes and kinds of freight and commodities, which are commonly moved, carried and transported by railroad companies in the freight traffic of such companies, between the city of St. Louis, in the State of Missouri, and the city of Omaha, in the State of Nebraska, and the city of Wichita, in the State of Kansas, and between all points intermediate and beyond cities on the line of defendant's railroad, which said railroad and which said points of shipment are situated in various States of the United States.

And your orator further avers and shows unto your honors that all shipments of freight between the city of St. Louis and the city of Wichita, and all shipments of freight between the city of St. Louis and the city of Omaha, by said defendant company pass over the same track between the city of St. Louis and the city of Holden, in the State of Missouri, a distance of 232 miles. That from said last-named point said defendant has two lines of railroad, one of which runs in a northwesterly direction to the city of Omaha, in the State of Nebraska, a distance over said defendant's railroad of five hundred — one (501) miles from the city of St. Louis, and one branch of which railroad runs in a southwesterly direction to the city of Wichita, in the State of Kansas, a distance over defendant's railroad from said city of St. Louis of 458 miles. That said defendant owns, controls, manages and operates both of said

lines of railroad in connection with many other lines of railroad, owned, controlled, managed and operated by it and forming the Missouri Pacific system, and extending into and
3 through many States of the United States, and that said defendant is constantly engaged as a common carrier of freight and passengers in the interstate commerce between the several States of the United States, and that the freight traffic between the said city of St. Louis and the city of Wichita over said defendant's railroad is very extensive in volume, amounting to many thousand dollars per annum, and that said city of St. Louis is a general distributing point situated on the Mississippi river, and furnishes a market for large amounts of live stock, and for freight of all classifications, and that the city of Wichita is a general distributing point for central and southern Kansas and the Indian Territory and Oklahoma, and furnishes an extensive market for freight of all classifications, and has extensive stock yards and is largely engaged in the shipment of live stock, and, but for the acts complained of, would carry on a large and profitable trade in the market furnished by St. Louis for live stock and for all classifications of freight. And that said defendant's railroad between said city of St. Louis and the city of Wichita with its western and southern connections with other railroads at the said city of Wichita constitutes one of the principal thoroughfares for the freight traffic between the Mississippi river and the Pacific ocean, and between the Mississippi river and the gulf of Mexico, at the city of Galveston.

And your orator further avers and shows unto your honors that said defendant has established, and for a long time has maintained in force, and still maintains in force on the line of its railroad between the city of St. Louis and the city of Wichita, aforesaid, rates, rules and regulations governing all freight traffic between said cities over the said railroad which are unjust and (*reasonable*) in this, that the charge for services rendered by said company in the transportation of property and freight of each and every classification between the said city of St. Louis and the city of Wichita is excessive and exorbitant to the great detriment and hindrance of commerce and trade between the cities and between said localities, and to the irreparable injury to the public and to the people of the United States.

And your orator further avers and shows unto your honors that said defendant has established and for a long time prior hereto has maintained in force, and still maintains in force upon its said railroad a tariff and schedule of freight rates, rules and regulations governing all freight traffic passing between the city of Omaha and the city of St. Louis, and all traffic passing between the city of Wichita and the city of St. Louis, by means of which said defend-
4 ant charges, demands, collects and receives a greater compensation for the transportation of property and freight of each and every classification over its railroad between the city of Wichita and the city of St. Louis than it does for the transportation of property and freight of the same kind and same classification between the city of Omaha and the city of St. Louis, notwithstanding the

fact that said shipments are made at the same time, and contemporaneously and under similar circumstances and conditions, and that the city of Omaha is a greater distance from St. Louis than the city of Wichita. That the tariff rates, rules and regulations in force on its railroad and the charges demanded and collected and received by defendant upon its railroad for shipments between the city of Wichita and the city of St. Louis are an unjust and unreasonable discrimination against persons shipping property between said city of Wichita and the city of St. Louis, and that said tariff rates, rules and regulations subject persons shipping between the city of Wichita and the city of St. Louis, and subject said localities, to an undue and unreasonable prejudice and disadvantage by reason of the fact that the charges made in pursuance of said tariff rates, rules and regulations are in excess of the charges made by said defendant for like and contemporaneous service for the transportation of property between the city of Omaha and the city of St. Louis under substantially similar circumstances and conditions and are unreasonable, excessive, exorbitant and unjust.

And your orator further avers and shows unto your honors that the tariff and schedule rate and charge for the shipment of cattle on foot between the city of Omaha and the city of St. Louis over defendant's railroad is 17½ cents per cwt. That the tariff and schedule rate and charge for the shipment of hogs on foot from the city of Omaha to the city of St. Louis over defendant's railroad is 20 cents per cwt. That the tariff and schedule rate and charge for the shipment of cattle on foot between the city of Wichita and the city of St. Louis over defendant's railroad is 28½ cents per cwt. That the tariff and schedule rate and charge for the shipment of hogs on foot between the city of Wichita and the city of St. Louis over defendant's railroad is 35 cents per cwt.

That the tariff and schedule rate and charge for the shipment of the various classifications of freight between the city of Omaha and the city of St. Louis over defendant's railroad is as follows, to wit:

First-class freight 55 cents per cwt.
Second-class freight 40 cents per cwt.
Third-class freight 32 cents per cwt.
Fourth-class freight 25 cents per cwt.
Fifth-class freight 20 cents per cwt.
Class A 22½ cents per cwt.
Class B 17½ cents per cwt.
Class C 15 cents per cwt.
Class D 12½ cents per cwt.
Class E 11 cents per cwt.

That the tariff and schedule rate and charge for shipment of the various classifications of freight between the city of Wichita and the city of St. Louis over defendant's railroad is as follows, to wit:

First-class freight 115 cents per cwt.
Second-class freight 93 cents per cwt.
Third-class freight 78 cents per cwt.
Fourth-class freight 62½ cents per cwt.
Fifth-class freight 53 cents per cwt.

Class A 52 cents per cwt.
Class B 39½ cents per cwt.
Class C 33 cents per cwt.
Class D 27 cents per cwt.
Class E 11 cents per cwt.

That said tariff and schedule rates and charges above set forth constitute in this an unjust and unreasonable discrimination against persons shipping freight between the city of Wichita and the city of St. Louis, and subject such persons and the localities from which they ship to an unjust and unreasonable prejudice and disadvantage to the great hindrance and detriment of trade and commerce between said localities and to the irreparable injury to the persons shipping from said points and to the people of the United States.

In consideration whereof and inasmuch as the wrongs herein complained of are remediless in the premises under the common law and are only reviewable in a court of equity and in this form of procedure your orator prays that the Missouri Pacific Railway Company, its officers, agents and employés may be provisionally and perpetually enjoined and restrained by order of injunction issued herein from further establishing and maintaining in force upon its road rates, rules and regulations and charges governing the freight traffic between the city of Wichita and the city of St. Louis by means whereof said defendant, its officers, agents and employés are required to and do collect a greater compensation for the shipment of live stock and for the shipment of any one of the various classifications of freight mentioned in the foregoing bill of complaint, between the city of Wichita and the city of St. Louis, than it at the same time charges and receives for shipment of live stock or freight of
6 either of the classifications named in the foregoing bill of complaint between the city of Omaha and the city of St. Louis, and that said defendant, its officers, agents and employés be required to establish, put into effect and maintain upon its said railroad the same or no greater rate and charge for transportation of freight of like classification between the city of Wichita and the city of St. Louis, than it puts into force and maintains between the city of St. Louis and the city of Omaha.

To the end therefore that said defendant may, if it can, show why your orator should not have the relief hereby prayed, and may according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to each and all the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph, and it was specially interrogated thereunto, may it please your honors to grant unto your orator a writ of *subpœna ad respond-um* issuing out of and under the seal of this honorable court, to be directed to said defendant, The Missouri Pacific Railway Company, commanding it on a certain day and under a certain penalty to be therein inserted, to appear before your honors in this honorable court and then and there full, true, direct and perfect answer make to all and singular the premises (answer under oath being hereby waived), and further to stand to, perform and

abide by such further order or decree as to your honors shall seem meet and just.

And also may it please your honors to grant to your orator a writ of provisional and a writ of perpetual injunction to the same tenor, purport and effect as hereinbefore set forth and prayed, and also that in the meantime said defendant may be temporarily restrained and enjoined by writ of preliminary injunction or rule issuing out of and under the seal of this honorable court, from doing any of the things against which an injunction is hereby prayed; and that your orator may have such other and further relief in the premises as the nature of the case may require and to your honors shall seem meet.

And your orator will ever pray, etc.

THE UNITED STATES OF AMERICA,
By J. W. ADY,
United States Attorney, Solicitor for Complainant.

J. E. HOWARD, *Of Counsel.*

UNITED STATES OF AMERICA, *District of Kansas,* } ss:

On this 25 day of July, 1893, before me personally appeared J. W. Ady, to me well known as such, and who being duly sworn
7 did depose and say that he was and is United States attorney for the district of Kansas; that he has read the foregoing bill of complaint and knows its contents, and that the matters and things therein contained are true as he verily believes.

J. W. ADY.

Subscribed and sworn to before me this 25 day of July, 1893.

JOSIAH FOLTZ,
Clerk Dist. Court,
[SEAL.] By ADDIE MEADE,
Deputy Clk.

Indorsed: 390. The United States of America *vs.* The Missouri Pacific Railway Company. Bill in chancery. Filed July 26, 1893. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States, District of Kansas.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

To the clerk of said court:

Please issue chancery subpœna directed to the defendant The Missouri Pacific Railway Company, commanding it on a certain day to appear and true and perfect answer make to all and singular the premises and to perform such order etc. required.

J. W. ADY, *U. S. Att'y.*
J. E. HOWARD, *Of Counsel.*

Indorsed: No. 390. U. S. of America *vs.* The Mo. Pac. Rwy. Co. Filed July 26th, 1893. Geo. F. Sharitt, clerk.

Chancery Subpœna.

UNITED STATES OF AMERICA, *District of Kansas, Second Division,* } ss:

The United States of America to the Missouri Pacific Railway Company, Greeting:

We command you and every one of you, that you appear before our judge of our circuit court of the United States of America for the district of Kansas, second division, at the city of Wichita on the first Monday in the month of September next, to answer the
8 bill of complaint of the United States of America this day filed in the clerk's office of said court, in said city of Wichita then and there to receive and abide by such judgment and decree as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Kansas to execute.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of Wichita, in said district, this 26th day of July, in the year of our Lord, one thousand eight hundred and ninety-three.

[SEAL.] GEO. F. SHARITT, *Clerk*,
By J. F. SHEARMAN, *Deputy*.

MEMORANDUM.—The above-named defendant is notified that unless it enter its appearance in the clerk's office of said court, at the city of Wichita aforesaid, on or before the day to which the above writ is returnable, the complaint will be taken against it as confessed, and a decree entered accordingly.

GEO. F. SHARITT, *Clerk*,
By J. F. SHEARMAN, *Deputy*.

Received this writ July 28th, 1893, and served the same on the within-named defendant The Missouri Pacific Railway Company, at Wichita, State and district of Kansas, July 28th, 1893, by delivering to G. H. Mann personally a true and certified copy of this writ with all the endorsements thereon, he the said G. H. Mann being then and there the freight agent for said defendant company, at its office and usual place of business in Wichita, Kansas.

I was unable to find any other officer of the Missouri Pacific Railway Company in my district.

R. L. WALKER,
U. S. Marshal,
By B. D. BEALL, *Deputy*.

One service $2.00.

Indorsed: No. 390. Circuit court United States, district of Kansas, second division. The United States of America *vs.* The Missouri

Pacific Railway Company. Chancery subpœna. Returnable to rule day first Monday in September, A. D. 1893. Geo. F. Sharitt, clerk. By J. F. Shearman, deputy. Filed July 28th, A. D. 1893. Geo. F. Sharitt, clerk.

9 In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant. } No. 390.

To Geo. F. Sharitt, Esq., clerk of the circuit court of the United States, district of Kansas:

You will please enter our appearance for the defendant, The Missouri Pacific Railway Company, in the above-entitled suit.

Yours, etc.,
B. P. WAGGENER,
J. H. RICHARDS,
Solicitors for Defendant, Fort Scott, Kansas.

Fort Scott, Kansas, August 29th, 1893.

Indorsed: 390. The United States of America *vs.* The Missouri Pacific Railway Co. Appearance for The Missouri Pacific Railway Co. d'f't. Filed Sept. 4th, 1893. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant. } No. 390.

Stipulation.

It is hereby stipulated and agreed that the time to plead in the above-entitled cause shall be extended until the November 1893, rule day.

Dated this 30th day of September, 1893.

W. C. PERRY, *U. S. Att'y.*

Indorsed: 390. U. S. A. *vs.* The Mo. Pac. R'y Co. Stipulation. Filed Oct. 3rd, 1893. Geo. F. Sharitt, clerk.

In the Circuit Court of the United States in and for the District of Kansas, 2d Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto that the court shall enter up the following order of submission:

10 Defendant is given (—) to file demurrer to complainant's (*file*) within five days.

Case then to be submitted to the court upon briefs of counsel.

Defendant to hand up its brief within forty days.

Complainant shall have thirty days thereafter within which to file its brief.

Defendant may file reply brief within twenty days.

If demurrer is overruled, defendant may plead within twenty days thereafter.

W. C. PERRY, *U. S. Att'y.*
W. P. WAGGENER AND
J. H. RICHARDS,
For Def't.

Indorsed: 390. The United States of America *vs.* The Mo. Pac. R'y Co. Stipulation. Filed Jan'y 8, 1894. Geo. F. Sharitt, cl'k.

Entry on Journal, Jan. 8, 1894.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Order.

The U. S. att'y W. C. Perry and J. H. Richards, attorney for defendant appearing in open court this 8th day of Jan. 1894, and mutually agreeing to mode of procedure to bring this suit to issue and having reduced said agreement to writing and filed the same in this court, the court being fully advised in the premises, orders and decrees that the defendant file *his* demurrer to complainant's bill within five days; case then to be submitted to the court upon briefs of counsel; defendant to file its brief within forty days; complainant to file brief within thirty days thereafter and defendant to reply within twenty days.

If demurrer is overruled defendant to plead within twenty days.

In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant. } No. 390.

The Demurrer of the Above-named Defendant, The Missouri Pacific Railway Company, to the Bill of Complaint of the Above-named Plaintiff.

11 This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said bill, and for causes of demurrer showeth:

I. That it appeareth by the plaintiff's own showing by the said bill, that it is not entitled to the relief prayed by the bill against this defendant.

II. That the said bill is exhibited against this defendant for several and distinct and independent matters and causes which have no relation to each other, and in which, or in the greater part of which, this defendant is in no way interested or concerned, and ought not to be implicated.

III. That this defendant is not answerable to said complainant, but to some other persons, whose names it cannot state.

IV. That the said bill does not embrace the whole matter concerning which the suit is brought. Wherefore this defendant may be harassed with other suits, and a multiplicity of suits may ensue.

V. That it appears by the said bill that there are divers other persons who are necessary parties to the said bill but who are not made parties thereto.

VI. That it appears by the said bill that the case of the said complainant is barred by the statute of limitations.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant doth demur thereto. And it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said bill; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

B. P. WAGGENER,
J. H. RICHARDS,
C. E. BENTON,
Solicitors for Defendant, The Missouri Pacific Railway Company.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

J. H. RICHARDS,
Solicitor for Defendant, The Missouri Pacific Railway Company.

12 STATE OF KANSAS, }
County of Bourbon, } ss:

J. H. Richards being duly sworn, deposes and says: I am one of the solicitors of the above-named defendant. The foregoing demurrer is not interposed for delay.

J. H. RICHARDS.

Sworn and subscribed to before me this 11th day of January, A. D. 1894.

[SEAL.]

GEO. O. BACON,
Notary Public, Bourbon County, Kansas.

My commission expires Aug. 6, 1895.

Indorsed: 390. U. S. *vs.* The Mo. Pac. R'y Co. Demurrer. Filed Jan'y 12, 1894. Geo. F. Sharitt, cl'k.

United States Circuit Court, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant.

This case is submitted to the court upon a demurrer by the railway company to the bill of complaint. For the purposes of this submission the facts alleged in the complaint are to be taken as true. The bill avers that "this action is brought by the authority of and under the direction of the Attorney General of the United States, which said authority and direction is given and made in pursuance of the request of the Interstate Commerce Commission of the United States, that the United States attorney for the district of Kansas be directed and authorized to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the interstate-commerce law against the defendant in relation to the matters hereinafter complained of."

The facts as set forth show the defendant railway company to be a common carrier owning the lines of railway and engaged in interstate commerce, between the cities of St. Louis, Missouri, Wichita, Kansas and Omaha, Nebraska. The distance from St. Louis to Wichita is 458 miles; to Omaha 501 miles. That all freight on defendant's lines to the two cities going to and from St. Louis passes over 232 miles of the same track, to Holden, Missouri, thence on separate lines to Wichita 226 miles, to Omaha 269 miles, being a haul of 43 miles less to Wichita than to Omaha.

The bill further sets out in detail the schedule rates of freight to the two cities showing that about one hundred per cent. greater rates are charged to Wichita than to Omaha, on the same
13 kind and classification of freights, and this while the shipments are made as alleged contemporaneously and under similar circumstances and conditions. It is further alleged that such rates are "unreasonable, excessive and exorbitant," and are unjust discrimination against the city of Wichita. That the city of Wichita is a general distributing point for a large scope of country embracing central and southern Kansas and the Indian Territory and Oklahoma, and that these exorbitant and unjust rates and this unlawful discrimination against the city of Wichita and its distributing territory, cause great and irreparable prejudice and injury to the citizens of the United States and the public generally engaged in and affected by this interstate commerce between St. Louis and Wichita.

The provisions of the interstate-commerce (—) upon which the charges are based are as follows:

Section one of "An act to regulate commerce" provides:

"That all charges made for any services rendered, or to be rendered, in the transportation of passengers or property aforesaid, or in any connection therewith, or for receiving, delivering, storing or handling such property shall be reasonable and just; and every

unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section two provides:

"That if any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any services rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section three provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or subject *to* any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

14 If the allegations of the bill are true, and they are so taken on demurrer, there seems to be no room for doubt as to the violation of the law by the defendant company.

In the able briefs presented by counsel for the respective parties the main point of controversy is, first, as to the right of the United States to maintain such a complaint against defendant in any form, and, second, as to the form in which that remedy is to be sought.

Counsel for defendants very tersely state their case as follows: "It is the theory of the defendant that the complainant has stated in its bill no just or sufficient facts to constitute a cause of action in its behalf against this defendant; that as a matter of law, the United States of America has not, pursuant to an act to regulate commerce, upon which this bill is founded, a cause of action against this defendant, and that this court has no jurisdiction, and cannot, by virtue of said act, or other power or right, draw unto itself original and independent jurisdiction to try said cause."

In view of what, upon the face of the bill, would seem to be a very gross violation of the express prohibitions of the interstate-commerce act, there certainly ought to be a remedy somehow and somewhere, there ought to be a means of compelling defendant company to obedience to this law. The whole object, intent and design of the interstate commerce act, with its sweeping clauses, and far-reaching and all-providing prohibitions, was to provide a safe, easy and expeditious mode of reaching and preventing just such abuses as are charged in this bill.

That relief may be had through a court of equity by injunction in such cases where the proper parties are before the court, is abundantly supported by the authorities and as a general proposition will

hardly be questioned. But, say the counsel for defendant we have here neither the proper parties nor the proper forum.

By act of Congress, February 10, 1891, the 12th section of the original act was amended by inserting after the first clause a provision which seems to have a special bearing on this question.

The amendment is shown in italics as follows: "*and the commission is hereby authorized and required to execute and enforce the provisions of this act; and upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply, to institute in the proper court, and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States,*" etc.

Now this amendment means something. It is couched in the language of a grant of new authority, and imposes additional requirements as to the rights and duty of the commission to see to it that the law is enforced. And a significant fact in this connection is that this enactment follows and might appear to be the logical sequence of the condition of things prior to the passage of the amendment as shown by the report of the commission on the 1st day of December 1891 and of the rulings of the courts in reference to the powers of the commission prior to the passage of that amendment.

In Fifth Annual Report, 1891 (p. 14–19), the commission says:

"Though required to execute and enforce the provisions of the act, the commission not being invested with power to enforce its own orders, is dependent for the efficiency of such execution and enforcement upon the courts.

"Within the year, and in compliance with the provisions of section 16 of the act, applications have been made by petition to the United States circuit court, and suits are now pending for the enforcement of the orders, which with a single exception were made in previous years."

Attention is called to the fact that the orders of the commission made in previous years were then going through the slow process of enforcement by the courts. This is what is by the counsel for the defendant forcibly styled "the circumlocution of procedure in the hitherto established ways."

To avoid this "circumlocution," and afford a speedy remedy is obviously desirable if it can be accomplished.

The abuse charged in the bill affects the public and is pecuniary in its nature. The injury is suffered by a large number of citizens of the United States through the alleged wrong-doing of the defendant in its quasi-public character of a great corporation engaged in interstate commerce, and under the direct protection, control and prohibition of the laws of the United States. The United States is bound to its citizens for the enforcement even of the criminal prohibitions of the statute leveled at all violations of the duties owed to the public by such common carriers.

16 Section 10 of the act makes any violation of the provisions of the act a misdemeanor punishable by a fine not exceeding $5000.

The act was passed by the Congress of the United States in pursuance of a right reserved by the Constitution to regulate interstate commerce. With this right to legislate on the subject goes the corresponding duty of the United States to protect the public interests, when invaded by violations of the rules laid down and prescribed by this law.

Here we have by the averments of the bill a case where thousands of her citizens, spread over a large territory, are being injured daily in their property rights and commercial interests, by a violation of this law in many of its most important features.

The only practicable remedy would seem to be by an equitable injunction against such practices and it would appear eminently right and just that the Government should move in the matter for the protection of its citizens, and to enforce obedience to its laws on the part of this great corporation, acting in its capacity of a quasi-public servant. These views are in harmony with, and supported by, many adjudicated cases maintaining the authority and duty of the sovereign to protect the public interests from unjust invasion and violation.

It is contended that even if the United States might bring such a complaint, it could be done only by proceedings initiated through the commission. That the remedy provided by the act is exclusive, and that access to the courts in such cases is solely and only through and by way of the commission. That a formal preliminary investigation by the commission is essential to vest jurisdiction in the court.

There is no question but that this is one way to reach the court; and it was at first doubtless deemed desirable as a ready mode of bringing the parties together, and enabling them in a spirit of mutual concession to adjust amicably and fairly their differences before the commission.

But in practice it seems the inherent defects of the system were very soon felt, in that the decisions of the commission did not decide anything, and its orders were not enforceable except upon the voluntary submission of the offending party.

In Kentucky & I. Bridge Co., *v.* S. & N. Rd. Co., 37 Fed. Rep. 567, cited by counsel for defendant, Judge Jackson in commenting on the relative powers of the commission and the courts, says:

17 "The act to regulate commerce does not undertake either to create an 'inferior court' or to invest the commission appointed thereunder with judicial powers or functions. It is invested with only administrative powers of supervision and investigation, which fall far short of making it a court, or its action judicial, in the proper sense of the term. Its action or conclusion upon matters brought before it for investigation is neither final nor conclusive; nor is it invested with any authority to enforce its decision or award. It hears, investigates and reports upon complaints made before it, but subsequent judicial proceedings are contemplated and provided for as the remedy for the enforcement of the order or report of the com-

mission in all cases where the party against whom its decision is rendered does not yield voluntary obedience thereto.

"The act does not make the circuit court the mere executioner of the commissioners' order or recommendation, so as to impose upon the court a non-judicial power.

"The suit in this court is, under the provisions of the act, an original and independent proceeding, in which the commissioners' report is made *prima facie* evidence of the matters or facts therein stated. The court is not confined to a mere re-examination of the case as heard and reported by the commission, but hears and determines the case *de novo*, upon proper pleadings and proofs; the latter including not only the *prima facie* facts reported by the commission, but all such other and further testimony as either party may introduce, bearing upon the matters in controversy."

This was in January, 1889, that Judge Jackson so plainly shows the defects of the commission as affording no final judicial settlement of controversies. As he well says upon the circuit court of the United States "the jurisdiction is conferred of enforcing the rights, duties and obligations" recognized by the interstate-commerce act. When cases begun before the commission reach the courts the only legal effect given by the act to the findings of the commission is to make them simply *prima facie* proof of the facts found, subject to be relitigated on a trial *de novo* as to the whole matter.

This decision and others in line with it, and the report of the commission in 1889, heretofore cited, in which complaint is made of the want of any ready means of enforcement of the decisions or orders of the commission, may well have led Congress to the enactment, on Feb'ry 10, 1891, of the amendment to sec. 12, of the act, cited *supra*, and may throw some light too upon the proper construction of the amendment.

18 When this amendment is considered, particularly in its historical connection with the first clause of the act, it seems impossible to escape the conclusion that it was intended to confer upon the commission a power and a direction to avoid this happily styled "circumlocution of procedure in the hitherto established ways" and to afford a speedy and effective means of bringing the offenders immediately before courts of competent jurisdiction to answer both civilly and criminally for their violation of the law. The language of the amendment is "and the commission is hereby authorized and required to execute and enforce the provisions of this act; and upon the request of the commission, it shall be the duty of any district attorney to whom the commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof."

This was after four years' trial of the practical operations of the commission, and painful experience of its inherent defects, so far as concerned the ultimate and final relief sought for by the honest

citizen contending against the abuses practiced by these great corporations.

The "preliminary investigation" was not only inefficient to right his wrong by any binding adjudications, but often, even where administered by the ablest jurists and best men in our country, was the means of piling up difficulties in his way, and creating new obstacles to the attainment of his rights.

Now this amendment in just so many words places the power in their hands and imposes upon their conscience the duty of seeing that this interstate-commerce act shall be enforced, and that there may be no delay in the matter it is added "and upon the request of the commission it shall be the duty of any district attorney, etc.," as cited *supra*. This request of the commission is alleged in the bill. It will be noted that the U. S. attorney when called upon is not merely to prosecute by indictment for the criminal feature of the violation of the law—which of course is done without the formal preliminary trial—but in the very same connection and by the sanction of this same provision he is "to institute in the proper court and prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof."

The language of this amendment clearly distinguishes the remedy from that provided in sec. 16, which is for an application to
19 the court for the enforcement of the orders of the commission. This is an application to be made by the proper United States officer "on the request of the commission," "for the enforcement of the provisions of this act, and for the punishment of all violations thereof."

"Punishment" refers to the prosecution for misdemeanors under sec. 10.

The clause "provisions of this act" occurs a score of times throughout the act, and except in a few instances where it is limited by the special matter to which it applies, is always used with reference to the great remedial features of the act, the rights protected and the wrongs redressed by it.

To reach a proper construction of this act and this amendment it must be kept in view steadily that the object of the creation of this commission was not merely to afford, as was supposed, a ready method of settling controversies between individual shippers and the common carriers, but it had a far wider sweep and higher scope and design, which was by affirmative action on the part of the commission on its own motion to have instituted and carried through, proceedings for the correction of abuses and the righting of wrongs, which affected the public commercial interests. And this, even, without the intervention of individual litigants at all. In section 16, it is made the "duty of the commission" and is "lawful for any company or person interested" to make the application there provided for.

That is merely to carry out and have executed by the courts the orders already made by the commission.

But the amendment to sec. 12 obviously contemplates the action

of the commission in causing original proceedings to be instituted in the proper courts for the enforcement of the act. Not only is the commission wanting in judicial authority to execute its decrees, but is also unlike the court in that it is not to wait for injured parties to appear at its door to prefer their complaints. It is actively and aggressively to "inquire into the management of the business of all common carriers" and to keep itself "informed as to the manner and method in which the same is conducted" and to obtain from them "full and complete information necessary to enable the commission to perform and carry out the objects for which it was created." These extracts are all from the first clause of sec. 12 of the act and following this is the next clause (quoted *supra*), which lays upon the commission broadly the duty to see to the enforcement of the wise and beneficent provisions of the act; and to that end whenever a proper case is found, its duty is plainly to call upon the United States, 20 th-ough its appointed officer the district attorney, to institute the necessary proceedings to right the wrongs and correct the abuses found to exist. The language of this clause is imperative "is authorized and required to execute and enforce."

And upon such request the district attorney shall "institute in the proper court" the "necessary proceedings for the enforcement of the provisions of this act."

In accomplishing the enforcement of the civil features of the act the commission bears much the same relation to the court that the grand jury does in criminal matters. By the methods provided under the act, and they are ample, the commission is to keep itself thoroughly informed as to all the operations of every common carrier in the United States engaged in interstate commerce, and whenever in the course of its investigations it discovers abuses which affect the public commercial interests injuriously its duty is at once to have such abuses suppressed and if need be to call in the strong arm of the Government through its appointed courts to enforce the provisions of the law.

In this case the allegation is made that the action is prosecuted "in pursuance of the request of the Interstate Commerce Commission of the United States," and "under direction of the Attorney General of the United States." These prerequisites for the bringing of the action are safeguards against the indiscriminate and ill-advised prosecutions apprehended by counsel for defendant. It is not to be supposed that the commission and the Attorney General of the United States would lend the sanction of their authority and direction to institute such proceedings except in cases where after due consideration their judgments dictated the necessity for the interposition of the strong arm of remedial justice.

Without attempting to follow counsel in detail through the able and exhaustive presentation of cases in their briefs, the court is of the opinion that the course pursued in the bringing of this action is sustained by the great current of authority as applied to the acts of Congress under which it is instituted. The invasions of great property rights, as distinguished from questions of mere sentiment or public policy, are in apt terms alleged in the bill. These property

rights are such as by the act of Congress the United States is bound to protect and enforce, and by a court of equity alone could any full and complete remedy be afforded. The demurrer to the complainant's bill is therefore overruled.

Indorsed: 390. Opinion. Filed Sep. 14, 1894. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

21 Entry on journal, Sept., 14, 1894.

J. B., 232.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant. } No. 390.

Now on this day the court having duly considered the demurrer to the bill of complaint heretofore filed herein by the defendant and being fully advised doth overrule the same, to which ruling of the court the defendant duly excepted and excepts.

Thereupon upon application of the said defendant it is ordered by the court that it be and is hereby given forty days within which to elect whether it will file its answer to said bill of complaint herein or will stand upon its said demurrer.

In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Defendant. } No. 390.

The Answer of the Missouri Pacific Railway Company to the Bill of Complaint of the United States of America.

This defendant now, and at all times, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the errors or uncertainties or other imperfections in said bill of complaint contained, for answer thereto or unto so much of such parts thereof as said defendant is advised is or are material for it to answer unto, says as follows:

First. It admits that it is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and that it was at the time of the filing of said bill of complaint, and is now, a common carrier of all classes and kinds of freight commonly carried and transported by railroad companies between the city of St. Louis in the State of Missouri, and the city of Omaha, in the State of Nebraska, and the city of Wichita, in the State of Kansas, and points intermediate thereto; but it denies that it is a corporation of the State of Kansas identical with the corporation incorporated in and known as the Missouri Pacific Railway Company of Kansas; and it alleges the fact to be that it has its principal office in the city of St. Louis and State of Missouri.

22 It admits that all shipments of freight between the city of St. Louis and the city of Wichita, and all shipments of freight between the city of St. Louis and the city of Omaha over its lines pass over the same track between the city of St. Louis and the city of Holden in the State of Missouri, as alleged in said bill of complaint but denies that from said last-named point the said defendant has two lines of railroad, one of which runs in a northwestern direction to the city of Omaha, in the State of Nebraska, a distance of 500 miles from the city of St. Louis, as alleged in said bill of complaint, and another which runs in a southwestern direction to the city of Wichita, in the State of Kansas, a distance of 458 miles from said city of St. Louis; but alleges the fact to be that it has over a part of said distance and between the said cities of Holden and Omaha, and the said cities of Holden and Wichita, lines of transportation over which freight and traffic is moved; and this defendant further denies that it owns all of said lines of railroad between the said cities of St. Louis and Omaha, and the said cities of St. Louis and Wichita over which it moves traffic, as alleged in said bill of complaint; and alleges the fact to be that that part of the line or lines lying in Kansas and over which freight is carried between the said city of Holden and the said city of Wichita belongs to a railway corporation known as the Kansas & Colorado Pacific Railway Company, organized under and by virtue of the laws of the State of Kansas.

Second. This defendant admits that it had at the time of the filing of this suit and for some time prior thereto maintained in force upon its railroad the tariffs and schedules of freight rates governing all freight traffic passing between the said cities of Wichita, Omaha and St. Louis by means of which it charged, demanded, collected and received compensation for the transportation of property and freight between said cities, and which said tariffs and schedules are set out in said bill of complaint; but it specifically and expressly denies the averments of said bill of complaint that said tariffs, rates, schedules and charges are unjust or unreasonable, excessive or exorbitant, or that they constitute an unjust and unreasonable discrimination against shippers, or that said tariff, rates and schedules, rules or regulations subject persons shipping between the said city of Wichita and the said city of St. Louis, or the localities of Wichita or St. Louis, to an undue or unreasonable prejudice or disadvantage, as alleged in said bill of complaint, by reason of the fact that the charges made in pursuance of said tariffs, rates, rules and regulations are in excess of the charges made by said defendant for like and cotemporaneous service of transportation of property between the said cities of Omaha and St. Louis under substantially simi-

23 lar circumstances and conditions, and expressly denies that such schedules, rates and charges are in that particular excessive, exorbitant and unjust; but this defendant alleges the fact to be that the difference between the schedules, tariffs, rates and charges demanded and collected between the said cities of St. Louis and Omaha, and the said cities of St. Louis and Wichita are wholly owing to the fact that the conditions and circumstances are substantially dissimilar between the St. Louis-Omaha line or lines, and the

St. Louis-Wichita line or lines, and are wholly governed by causes over which this defendant has no possible control.

Further denying, and defending against the averments of said bill of complaint, this defendant says:

1. That there is great dissimilarity of circumstances and conditions in respect of (1) the length and character of haul; (2), cost of service; (3), volume of business; (4), conditions of competition; (5), storage capacity and geographical position; (6), situation of different terminal points; (7), competition by water transportation and by many railroad lines; (8), by reason of many commercial advantages; (9), by reason of the environments of the respective cities of Wichita and Omaha, together with other substantially dissimilar circumstances and conditions.

2. The relative rates between the said cities of St. Louis and Omaha, and the said cities of St. Louis and Wichita are further controlled by the further following facts, circumstances and conditions, to wit, the Mississippi river is the basing line for all rates for territory lying west thereof between it and the Missouri river, and the Missouri river is a basing line of all rates between it and Wichita; that the rating of all shipments of freight originating in the Middle and Eastern States having destination in the States of Iowa and Nebraska and other Trans-Mississippi territory is found by adding the rate from point of origin to the Mississippi river, and the rate from the Mississippi river to the point of destination; that the rates to the cities located on the Mississippi river from Clinton, Iowa, on the north, to St. Louis on the south, both inclusive, on business from the manufacturing and other industrial districts in the Middle and Eastern States destined to the Missouri river are alike to all; that all the Mississippi River cities located within these limitations are entitled by location and otherwise to compete and do compete for the trade of the cities located on and west of the Missouri river, Omaha to Kansas City, inclusive, so that the rate to any one of them must of necessity be no higher than those governing from any of the others in order to permit shipment to them of products
24 and freight from the East and reshipment thence to the consuming territory; that the measure of the rate charged from such Mississippi River crossings to Omaha is the schedule and rate maintained by the short lines from the principal Mississippi crossings across the State of Iowa to Omaha; that the distance of some of these, for instance, from Burlington to Council Bluffs, Iowa, via the C. B. & Q. is but 293 miles; from Davenport via Rock Island railway, 316 miles; from Clinton, Iowa, via C. & N. W. 350 miles; that the distance from St. Louis to Omaha via the Wabash railroad which is the short line, is only 280 miles, which line by reason of being the short line, absolutely controls the tariff between the said cities of St. Louis and Omaha; that the Missouri Pacific railway from St. Louis to Omaha runs through an agricultural territory and serves many important business centers, as, for instance, Jefferson City, Sedalia, Kansas City, Atchison, St. Joseph; that owing to the large amount of local business of all kinds, and the further fact that the service for the local business is utilized for the through busi-

ness, the train service having to be maintained for the local business, the compensation for the total through business and local business is barely compensatory upon the basis of the aforesaid schedules; that this defendant is compelled to take and do business at the rate of such schedules or withdraw from that territory; that such withdrawal would simply result in lifting the Missouri Pacific railway out of such traffic without accomplishing any corresponding benefit to the city of Wichita or to the public in general; that these are conditions, circumstances and environments entirely beyond the control of this defendant and are conditions that do not exist as to the city of Wichita, or Wichita business, either from St. Louis or the eastern seaboard; that as between the said cities of Omaha and Wichita there is the further difference that the Missouri river is a basing line which extends from all Missouri River points to Kansas City, and thence southerly through the cities of Fort Scott, Kansas, and Joplin, Missouri; that the city of Wichita lies about — miles from what is known as the Missouri River basing line; that tariff at the Missouri River line is influenced largely not only by volume of business, competition, cost of transportation and other elements affecting the rates, but also by the fact that the Missouri river is in fact in a measure and potentially in a much larger measure, favored by water transportation; that the city of Omaha is likewise affected by the same condition, being located upon the Missouri river.

3. That the rates west of the Missouri River crossings and the Missouri River basing line extended as aforesaid and the city of Wichita are necessarily still further augmented by the following conditions, to wit:

The following lines of railway run into and through the city of Wichita, and did so run at the time of the filing of said bill of complaint: The Missouri Pacific railway, over the Kansas & Colorado Pacific railway; the Atchison, Topeka and Santa Fe railroad; the St. Louis and San Francisco railway, and the Chicago, Rock Island & Pacific railway; that all of these lines are branch lines except the St. Louis and San Francisco and the Chicago, Rock Island & Pacific railroads, which former road is now and was at the time of the filing of said bill of complaint, controlled and operated by the Atchison, Topeka & Santa Fe Railroad Company; that of these only two, the Missouri Pacific and the St. Louis & San Francisco railroads run between the cities of Wichita and St. Louis; that of these only the Missouri Pacific and the Chicago, Rock Island & Pacific railway connect with both the city of Omaha and the city of Wichita; that the intermediate towns between the Missouri river and the city of Wichita are generally much less numerous and of much less commercial importance than upon the line between St. Louis and Omaha; that the country is much more sparsely settled; that while the country in the region of Wichita and for a large part of the distance between the Missouri river and Wichita, is wholly an agricultural country, without any mineral resources whatever, the crops, especially in the vicinity of Wichita, and the country tributary thereto, have been exceedingly uncertain and

precarious; that the fuel consumed in the operation of defendant's line of railway between the eastern line of the State of Kansas and the city of Wichita has to be hauled onto its lines at great expense, and that owing to the reduced and restricted volume of business it is necessary to handle much of the freight both in and out in less than car-load and less than train-load lots, thus greatly increasing the expenses of service; that these unfavorable conditions do not as a rule obtain with reference to the city of Omaha; that the population of the city of Wichita is probably only about half the population of the city — Omaha; that the said city of Wichita has as many through main lines of railroad as the city of Omaha; that whereas said city of Omaha is located upon the Missouri river, potentially navigable if not in fact, in the center of a large agricultural area and convenient to coal and other fuels, the city of Wichita is a long distance from any navigable stream, potential or in fact, often with insufficient water supply, and insufficient and deficient fuel and timber supply; for train service; that whereas the said city of Omaha has, as this defendant is informed and believes, a large and flourishing stock yards and packing-houses, the packing-houses and
26. stock yards of the city of Wichita have, not by reason of the alleged discriminations, as charged, but as this defendant believes, and is informed, by reason of the recent repeated and continued failure of crops almost if not quite suspended operation; that many other dissimilar conditions and circumstances exist; that these are conditions and environments entirely beyond the control of this defendant; that the circumstances and conditions therefore under which the Omaha-Wichita freight rates are handled are not substantially similar, but substantially and wholly dissimilar.

Third. This defendant further expressly denying that it by any mode or means discriminates in favor of the said city of Omaha against the said city of Wichita, or by any mode or means exercises undue preferences to the detriment and hindrance of commerce and trade between the said cities and between the said localities, or that it in any manner subjects the said localities of Wichita and St. Louis to any unreasonable and undue prejudice and disadvantage by reason of the alleged fact that the charges made in pursuance of said tariff rates, rules and regulations, are in excess of the charges made by it for like and cotemporaneous service for the transportation of property between the city of Omaha and the city of St. Louis, under substantially similar circumstances and conditions as it is alleged, alleges the fact to be that there is no possible relation of commerce, or of business, or competition, existing between the said cities of Omaha and Wichita upon which a charge either of discrimination or undue or unreasonable preference, prejudice, or disadvantage may be predicated, but that upon the contrary there is little or no competition whatever between the two cities in any St. Louis market, or other market wherein the rates between the said cities and the city of St. Louis are involved, and that the schedule or schedules referred to and the rates which this defendant so made or makes between the cities of St. Louis and Omaha do not operate in any manner directly or indirectly to affect either the prosperity of the city of

Wichita, the people interested in her municipal welfare or the sale or prices of her products or commodities in any market or markets in the country.

Fourth. Further answering said bill of complaint this defendant expressly denies that the schedules or rates complained of in said bill of complaint are in any manner affected with a public interest or are in any legal or proper sense detrimental to commerce and trade, or in any way directly or indirectly hinder commerce or trade, to the injury of the localities or municipalities in question, or to the public at large, or to the people of the United States, or
27 to the United States of America; and this defendant avers and shows the fact to be that neither the public nor the United States of America nor the people at large nor any one nor any locality or municipality outside of the municipality of the city of Wichita is either directly or indirectly concerned or interested in or affected by any tariff or rate or schedule complained of in said bill of complaint.

Fifth. This defendant further denying as alleged in said bill of complaint, that but for the acts complained of the said city of Wichita would carry on a large and profitable trade in the market furnished by St. Louis for live stock and for all classifications of freight, and that said defendant's railroad between said cities of St. Louis and Wichita with its western and southern connections with other roads at the city of Wichita would but for such fact, constitute one of the principal thoroughfares in freight traffic between the Mississippi river and the Pacific ocean and between the Mississippi river and the gulf of Mexico at the city of Galveston, alleges the fact to be that its line of railroad from the city of St. Louis to the city of Wichita has no direct through or continuous line or connection and no direct operation between the Mississippi river and the western seaboard or Pacific coast, or the gulf of Mexico or the city of Galveston, either over its own lines or over the lines of other roads, so as to be able to control, fix or make through tariffs and that its own line of road running to the city of Wichita ends at the town of Kiowa, on the southwest, and the town of Kanapolis on the northwest; and this defendant further expressly denying that by reason of any unjust or excessive charge for freights or any unreasonable or unjust preferences or discriminations as charged in said bill of complaint, chargeable against this defendant, the said city of Wichita has been limited or restricted as a distributing point for central and southern Kansas or the Indian Territory or Oklahoma, or that it has by virtue of said schedules prevented it from furnishing, as alleged, an extensive market with freight of all classifications or limited or restricted the use or usefulness of its stock yards or its shipment of live stock, as alleged in said bill of complaint, alleges the fact to be if it has been restricted, as this defendant does not doubt that it has, as a general distributing point for either southern Kansas or the Indian Territory or Oklahoma, or all of these, or as a market for freight of any kind, or if the stock yards located at said city of Wichita have not done the business which they may have done in former and more prosperous times, these conditions are not

attributable to any charges or schedules which it makes either to or from Wichita or to or from the said city of Omaha, as it is
28 alleged; but altogether to conditions, causes, influences and environments over which this defendant has no control and which inhere wholly in location, climate, market, distance, cost of service, competition, volume of trade, and other environments for which this defendant is in no manner responsible.

Sixth. Defendant further avers and shows that no complaint has ever been filed with the Interstate Commerce Commission of anything done or omitted to be done by defendant company in respect of said schedules in contravention of the provisions of the interstate-commerce act and as required by law; that no such complaint has ever been forwarded or presented to this defendant, or demand made upon it for reparation for any alleged injury as required by law; that the Interstate Commerce Commission never as matter of fact investigated such or any complaint or the alleged question at issue between this defendant and the city of Wichita in fact or as required by law; that said commission has never made an order, recommendation, report, or finding upon the issues between the complainant and this defendant as required by law; that it never was in fact made to appear to the satisfaction of the commission that anything had been done or omitted in violation of the act or of any law cognizable by the commission or that any injury had ever been sustained by the complainant as required by law; that no notice to cease or desist from any alleged violation or to make reparation for any alleged injury within any time named by the commission, or any opportunity given this defendant to make reparation for any alleged injury within any time named by the commission, as required by law; that this defendant never violated or refused or neglected to obey or perform any lawful order or requirement of the commission, or of any court relating thereto; that this suit was never in fact brought by the authority of or under the direction of the Attorney General of the United States made in pursuance of the request of the Interstate Commerce Commission of the United States, as required by law; that said commission never in fact made any request that the United States attorney for the district of Kansas be directed and authorized to institute and prosecute the proceedings against this defendant in the mode and manner required by law; that the schedules complained of in the bill of complaint herein have been lawfully made, published and approved by the Interstate Commerce Commission, as required by law; that said commission has never, agreeably to the provisions of the law in that regard duly caused a properly authenticated copy of any report in respect of the matters at issue in said complaint, together with any order or notice aforesaid, to be delivered to this defend-
29 ant; that such schedules had been for years prior thereto and were at the time of the filing of said bill of complaint in full legal force and effect unimpeached by the commission or by any court, and that no charge had ever been made or proven that it was illegal or unjust or discriminatory in its character; that

no order has ever been made by the commission in relation thereto as required by law;

Wherefore and by reason of the aforesaid matters and things this defendant is advised by counsel and therefore avers that the act under which and upon which it is alleged in said bill of complaint this suit is founded does not authorize or empower the commission, or the Attorney General of the United States, or the district attorney for the State of Kansas, to institute this suit.

And this defendant is advised by counsel and therefore avers that neither by virtue of said act nor any other right or power has this court jurisdiction nor can it draw unto itself jurisdiction under the facts and circumstances presented by said bill of complaint and the issues hereby joined to hear and determine this suit.

Seventh. This defendant is advised by counsel and therefore avers that the United States of America has no just cause of complaint against this defendant that this defendant has never either directly or indirectly by making or enforcing the schedules complained of in this bill of complaint done injury to either the United States of America or any officer thereof nor to the public at large, and that the United States of America having no just cause of action or of complaint either at law or in equity against this defendant by reason of making or enforcing the schedules, tariffs and rates charged in said bill of complaint, is unduly and unjustly harassing and oppressing this defendant in an illegal and unjustifiable prosecution of this suit.

Eighth. Defendant further alleges and charges the fact to be that the issues involved in this suit cannot be fairly determined for the reason that the railway companies who are responsible for the rates and schedules in question are not parties hereto and should be made parties in order to a full and complete determination of the issues.

That the following-named carriers are responsible for the rates to Wichita, from the Mississippi and Missouri River crossings:

The Chicago, Rock Island & Pacific Railway Company;

The Atchison, Topeka & Santa Fe Railroad Company;

The St. Louis & San Francisco Railway Company.

30 And inasmuch as any change in the rates to Wichita will seriously and generally affect the rates of freight all over the State of Kansas, all other lines interested in traffic to and from the State of Kansas should necessarily become parties to this suit, viz:

The Missouri, Kansas & Texas Railway Company;

The Kansas City, Fort Scott & Memphis Railway Company;

The Union Pacific Railroad Company;

The St. Joseph & Grand Island Railway Company;

The Kansas City, Wyandotte & Northwestern Railway Company;

The Burlington & Missouri River Railroad Company;

The Hutchinson & Southern Railroad Company;

The Kansas City, Pittsburg & Gulf Railway Company;

And inasmuch as the final determination of this suit is likely to affect the rates between the cities of Omaha and St. Louis, and inasmuch as the lines running between the Mississippi River crossings between Clinton, Iowa, and St. Louis and Omaha inclusive and the

city of Omaha make and control the rates, tariffs, and schedules on all classifications of freight between the city of St. Louis and the city of Omaha over defendant's line of railway, and it is powerless to make or reduce the rates, such lines are indispensable parties to the complete and final determination of the rates involved, and should be made parties to this suit. They are:

The Wabash Railroad Company;
The St. Louis, Keokuk & Northwestern Railway Company;
The Burlington & Missouri River Railroad in Nebraska;
The Chicago, Burlington & Quincy Railway Company;
The Illinois Central Railway Company;
The Chicago, Milwaukee & St. Paul Railway Company;
The Chicago, Northwestern Railway Company;
The Fremont & Elkhorn Valley Railroad Company;
The Chicago, St. Paul, Minneapolis & Omaha Railway Company;
The Chicago & Great Western Railway Company;
The Chicago & Alton Railway Company.

Wherefore, this defendant asks and prays this honorable court to make an order of intervention requiring the complainant herein to make all of said railway and railroad companies codefendants to this suit. And avers that each and all of such parties and companies are indispensable as the radical change involved, or indeed any change would not only seriously affect and upset rates in all
31 said territory, but likewise seriously affect shippers and shipping interests in all said territory.

Ninth. This defendant specially and expressly denies that the wrongs herein complained of are remediless in the premises at law, or only relievable in a court of equity and under the form of procedure instituted, but alleges the fact to be that the real party in interest, to wit: the municipality and locality of Wichita, together with any and all other persons or parties having any pretended or just cause of action against this defendant, and as well also the complainant, The United States of America, have under and by virtue of the provisions of the aforesaid act of interstate commerce, and in the courts of the State of Kansas, easy, adequate and complete remedies at law for every possible form of excessive charge, discrimination or undue preference, and for the correction or amendment of any alleged unlawful or oppressive schedule, rate or tariff, and this defendant is advised by counsel and avers the fact to be that under the law in such cases made and provided and applicable to proceedings for the prevention of unreasonable charges or unlawful discrimination or undue preference, this court is without jurisdiction to hear and determine this cause without the same having first been submitted to and passed upon by the Board of Interstate Commerce Commission as specifically provided by the terms of said act.

Wherefore this defendant, having fully answered to the said bill of complaint in so far as it is advised the same is material and necessary to be answered unto denies that the said complainant is entitled to the relief or any part thereof in said bill of complaint demanded, or any relief whatsoever; prays the same advantage of its aforesaid answer as if it had pleaded and demurred to said bill of complaint,

and prays to be hence dismissed with its most reasonable charges in this behalf most wrongfully sustained.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Defendant*,
By B. P. WAGGENER,
J. H. RICHARDS,
C. E. BENTON, *Solicitors*.

THE UNITED STATES OF AMERICA, }
Second Division for the District of Kansas. }

On this 23rd day of October, 1894, before me, the undersigned, a notary public, at Fort Scott, Kansas, appeared the within-named J. H. Richards, and made oath:

32 That he is the general attorney of the defendant, The Missouri Pacific Railway Company, and vice-president of the main line of road in question within the State of Kansas.

That he signed the said answer as such officer by authority of the said company.

That he has read the same and knows the contents thereof, and the matters stated therein as of his own knowledge are true, and as to the matters stated upon the information of others he believes to be true.

J. H. RICHARDS.

Subscribed and sworn to before me this 23rd day of October, 1894.

My commission expires Aug. 6, 1895.

GEO. O. BACON,
Notary Public, Bourbon County, Kansas.

Indorsed: No. 390. The United States of America *vs.* The Missouri Pacific Railway Company. Answer of The Missouri Pacific Railway Company, defendant. Filed Oct. 24th, 1894. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

In the Circuit Court of the United States for the District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant, }
vs. } In Equity.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. }

Exceptions Taken by the Above-named Complainants to the Answer of the Defendant.

First exception. For that the said defendant has not, to the best of its knowledge, remembrance, information and belief, answered and set forth a full, just and sufficient statement of the facts as to what constitutes the substantially dissimilar conditions and circumstances in the matter of the difference between the schedules, tariffs, rates and charges demanded and collected between the cities of St.

Louis and Omaha, and the said cities of St. Louis and Wichita; and particularly the complainants say that said answer is subject to exception because it does not aver in what respect there are substantially dissimilar conditions and circumstances: (1), in the length and character of haul; (2), cost of service; (3), volume of business; (4), conditions of competition; (5), storage capacity and geographical position; (6), situation of different terminal points; (7), competition by water transportation and by many railroad lines; (8), by reason of many commercial advantages; (9), by reason of the environments of the respective cities of Wichita and Omaha; and com-
33 plainants except to all of that portion of the second paragraph marked figure (1) of the answer above referred to, for the reasons hereinbefore stated, and also for the reason that said portion of said paragraph states conclusions and not facts.

Second exception. And the complainants also except to all of that part of the second paragraph of the answer marked figure 2, for the reason that the allegations therein contained do not state facts sufficient in law or equity to constitute a defense to the allegations of the bill admitted in the answer; and complainants except further to said matter so contained in the answer for the reason that the defendant had and has no legal right to agree to or bind itself by any contract or understanding making the Mississippi river a basing line for all freight rates to points lying west of the Mississippi river, and between that river and the Missouri river; and also because said defendant had no legal right to enter into or bind itself by any contract or understanding that any or all freight rates to points west of the Missouri river, or to the city of Wichita and the vicinity thereof, should be founded or based on any arbitrary line consisting in part of the Missouri river and an extension thereof southward through Fort Scott, Kansas, and Joplin, Missouri, of any such line; and also for the reason that the defendant in law is not authorized to fix the rates of freight to Omaha on the basis of the mileage between St. Louis and Omaha by the short line, and to justify itself in charging a larger rate of freight between Wichita and St. Louis, because the rate to Omaha charged by it is unprofitable; and further, because it is not averred that the tariff on freight between St. Louis and Wichita, if fixed on the Omaha basis, would not be profitable and remunerative to the defendant.

Third exception. And complainants except to the third paragraph of the answer for the reason that said paragraph is argumentative, and states conclusions rather than facts, and because it makes no difference whether there is or is not competition between Omaha and Wichita and in the St. Louis market, and said defendant does not fully answer complainants' bill of complaint.

Fourth exception. And the complainants except to the fourth paragraph of the answer for the reason that said paragraph states conclusions and not facts, and because said paragraph does not state facts sufficient to constitute a defense to the allegations of the bill admitted in said answer.

Fifth exception. Complainants except to the fifth paragraph

of the answer of the defendant for the reason that said
34 paragraph is argumentative, and does not state facts sufficient to constitute a defense to the allegations of the bill admitted in the answer, and states conclusions of law.

Sixth exception. And complainants except to the sixth paragraph of the answer for the reason that the matter therein pleaded has already been adjudicated in this court on the decision on the demurrer of the defendant to the bill of complaint, and because said matter is insufficient to constitute a defense to the admitted allegations of the bill.

Seventh exception. And complainants except to the seventh paragraph of the answer for the reason that the matter therein pleaded has already been adjudicated in this court on the decision on the demurrer of the defendant to the bill of complaint, and because said matter is insufficient to constitute a defense to the admitted allegations of the bill.

Eighth exception. Complainants except to the eighth paragraph of the answer for the reason that the issues involved in this suit can be fairly and fully determined without making any other person or corporation a party thereto.

Ninth exception. And complainants except to the ninth paragraph of the answer for the reason that the matter therein pleaded has already been adjudicated in this court on the decision on the demurrer of the defendant to the bill of complaint, and because said matter is insufficient to constitute a defense to the admitted allegations of the bill, and for the reason also, that it is not true that full and adequate relief from the wrongs complained of in the bill can be had by any proceeding at law.

In all of which particulars the said complainants except to the answer of said defendant as evasive, imperfect and insufficient, and humbly pray that the said defendant may be compelled to put in full and sufficient answer thereto.

W. C. PERRY,
United States Attorney and Solicitor for Complainants.

R. R. VERMILION, *Of Counsel.*

Indorsed: 390. Exceptions to answer. Filed Feb. 12, 1895. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

35 In the Circuit Court of the United States for the District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.
} In Equity. No. 390.

Motion of Defendant to Take Exceptions of Above-named Complainant from the Files.

Now comes said defendent, The Missouri Pacific Railway Company, and moves the court that each and every and all and singular of the pretended exceptions of above-named complainant to the answer of this defendant be taken from the files for the following reasons, to wit:

1st. Because each and every of said pretended exceptions is irregular, indefinite, and too general in its terms in this, to wit, that each and every of said pretended exceptions fails to point out specifically and definitely the matters, charges or interrogatories in said bill which it is claimed are not sufficiently answered, and fails to state the terms of the answer to such matters, charges or interrogatories.

2nd. Because exceptions do not lie to the answer of this defendant for the reason that defendant is a corporation and answer under oath was waived by complainant in the bill filed herein.

3rd. And defendant further moves the court that each and every of the third, sixth, seventh, eighth and ninth pretended exceptions of said complainant be taken from the files for the reasons aforesaid, and for the additional reason that each and every of said pretended exceptions relate to new matter set up in the answer by way of defense and not to matter which is not sufficiently responsive to the charge or interrogatories of the bill.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Defendant*,
By B. P. WAGGENER,
J. H. RICHARDS,
C. E. BENTON, *Solicitors.*

Indorsed: No. 390. The United States of America, complainant, *vs.* The Missouri Pacific Railway Company, defendant. Motion of defendant to take complainant's exceptions from the files. Filed Feb. 28, 1895. Geo. F. Sharitt, clerk, by J. F. Shearman, D. C.

36 Entry on Journal, March 13, 1895. J. B., 458.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } No. 390.

Now upon this day this cause came on to be heard upon defendant's motion to strike from the files complainant's exceptions to the answer herein and said motion is argued and submitted and the parties are given leave to file briefs upon said motion.

In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

The motion of the defendant to take the exceptions of the plaintiff to the defendant's answer from the files coming on to be heard, the court being well advised in the matter, it is ordered and adjudged that said motion be and the same is hereby overruled, to which ruling the defendant at the time duly excepted and excepts.

JNO. A. WILLIAMS, *Judge.*

Indorsed: 390. Order. Filed Dec. 16, 1895. Geo. F. Sharitt, clerk, by J. F. Shearman, D. C.

In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

This cause coming on to be heard upon the exceptions of the plaintiff to the answer of the defendant, and the court being well advised in the matter, it is ordered and adjudged that said exceptions be and the same are hereby in all things sustained. And the defendant is given until rule day of this court, in February, to file an amended answer herein, to which rulings the defendant at the time duly excepted and excepts.

JNO. A. WILLIAMS, *Judge.*

Indorsed: 390. Order. Filed Dec. 16, 1895. Geo. F. Sharitt, clerk, by J. F. Shearman, D. C.

37 In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY.

This cause comes on to be heard upon the exceptions of the plaintiff to the answer of the defendant and the motion of the defendant to take said exceptions from the files; so both questions may be disposed of together.

First, as to the exceptions to the answer. Many of the exceptions relate to matters contained in the answer which it is alleged have already been passed upon in disposing of the demurrer to the complaint in this cause. Another portion of the exceptions refers to matter in the answer which alleges that the plaintiff, and especially the City of Wichita, has a complete and adequate remedy at law. And other exceptions relate to that portion of the answer which alleges that there is a defect of parties defendant; that all other railroads conducting their business in the territory mentioned in the bill of complaint herein should be made parties defendant.

These three, especially the first two, matters were virtually raised and passed upon in deciding the demurrer to the original bill, and the court is of the opinion now that it is a matter of such public interest, and that the City of Wichita has no adequate remedy at law, so it may well be taken cognizance of by a court of equity. Many portions of the answer reiterate matters that were passed upon by the demurrer and need not be referred to with any particularity.

In regard to the defect of parties defendant, the court sees no reason why the Government should be compelled to make all of the railroads doing business in the territory described parties defendant for neither it nor the public may have any complaint against any others but the defendant in this action. But, whether there be complaint or not the court fails to see how the defendant here can require all roads to be made parties in an action brought against it by the Government for alleged violations of the interstate commerce law or for any of the matters complained of in the complaint herein.

The other exceptions relate to matters which the counsel for the Government contend are uncertain and argumentative and state conclusions of law and not matters of fact. The court is of the opinion that these exceptions are also well taken, for it is
38 apparent that the answer does not state conclusions of law and not matters of fact, and presents arguments instead of facts.

Another exception is to that portion of the answer which sets up that the basis for all freight rates is fixed at the Mississippi and Missouri rivers. Why this is done and by what authority and for what reason, public or otherwise, the answer fails to disclose. It seems to be fixed at the will of the defendant and other common carriers of freight and the assertions of the answer would indicate that, when so fixed and determined, neither the Government nor

any one else can be heard to complain. I am of the opinion that the exception to this part of the answer is well taken.

An order will be entered, sustaining all of the exceptions to the answer of the defendant filed herein, and consequently overruling the motion of the defendant to take said exception from the files.

JNO. A. WILLIAMS, *Judge.*

Indorsed: 390. Order. Filed Dec. 16, 1895. Geo. F. Sharitt, clerk. B. J. F. Shearman, D. C.

Entry on journal, March 11, 1896.

UNITED STATES, Compl't,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Def't. } No. 390.

It appearing that full argument was not had on the exceptions of the complainant to the answer of the defendant, on application of the defendant it is now ordered that the order heretofore entered sustaining said exceptions be and the same hereby is set aside and said exceptions set down for argument before Hon. John A. Williams, on a day to be by him designated.

CASSIUS G. FOSTER, *Judge.*

In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } No. 390.

The Amended Answer of the Missouri Pacific Railway Company to the Bill of Complaint of the United States of America.

This defendant now, and at all times, saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the errors or uncertainties or other imperfec-
39 tions in said bill of complaint contained, for answer thereto, or unto so much of such parts thereof as said defendant is advised is or are material for it to answer unto says, as follows:

I.

It admits that it is a corporation organized and existing under and by virtue of the laws of the State of Missouri, and that it was at the time of the filing of said bill of complaint, and is now, a common carrier of all classes and kinds of freight commonly carried and transported by railroad companies between the city of St. Louis in the State of Missouri and the city of Omaha, in the State of Nebraska, and the city of Wichita in the State of Kansas, and points intermediate thereto, except as hereinafter more specifically set forth in paragraph 2 page 4 of this answer.

It admits that all shipments of freight between the city of St.

Louis and the city of Wichita, and all shipments of freight between the city of St. Louis and the city of Omaha over its lines pass over the same track between the city of St. Louis and the city of Holden, in the State of Missouri, as alleged in said bill of complaint.

II.

This defendant admits that it had at the time of the filing of this suit, and for some time prior thereto, maintained in force upon its lines of road, the tariffs and schedules of freight rates governing all freight traffic moved between said cities of Wichita, Omaha and St. Louis, by means of which it charged, demanded, collected and received, except as hereinafter particularly set forth in paragraph 2 on page 4 of this answer, compensation for the transportation of property and freight between said cities, and which said tariffs and schedules are properly set out in said bill of complaint;

But this defendant specifically and expressly denies the averments of said bill of complaint that said tariffs, rates, schedules and charges are unjust or unreasonable, excessive or exorbitant, or that they constitute an unjust and unreasonable discrimination against shippers, or that said tariff, rates and schedules, rules or regulations subject persons shipping between said city of Wichita and said city of St. Louis, or the localities of Wichita or St. Louis, to an undue or unreasonable prejudice or disadvantage, as charged in said bill of complaint, by reason of the fact that the charges made in pursuance of said tariff, rates, rules and regulations are in excess of the charges made by this defendant for like and contemporaneous service of transportation of property between said cities of Omaha and St. Louis under substantially similar circumstances and conditions.

40 But this defendant alleges the fact to be that the difference between the schedules, tariffs, rates and charges demanded and collected between said cities of St. Louis and Omaha, and said cities of St. Louis and Wichita *are* wholly owing to the fact that the conditions and circumstances are substantially dissimilar between the St. Louis-Omaha line and the said St. Louis-Wichita line, and *are* wholly governed by causes over which this defendant has no possible control.

And defendant specially denies that, as charged in said bill of complaint, but for the acts of this defendant complained of therein, the said city of Wichita would carry on a large and profitable trade in the market furnished by St. Louis for live stock and for all classifications of freight, but alleges the fact to be that the trade, business, markets and transportation of each and all of the classes, classifications and kinds of freights are wholly governed by conditions of commerce, trade, market, business and transportation which exist and operate wholly independent of the aforesaid rates, rules, tariffs or regulations put into force by this defendant, or by means of which it charges, demands, collects or receives compensation therefor.

Further denying, and defending against the averments of said bill of complaint, this defendant says:

That there is great dissimilarity of circumstances and conditions in respect of:

(1.) The character and volume of business;

(2.) The cost of service;

(3.) The competition of many independent lines of railroad and water transportation;

(4.) By reason of many commercial advantages, geographical position and climatic conditions of the respective cities of Wichita and Omaha and their vicinities, together with other substantially dissimilar circumstances and conditions.

And to state the facts with greater particularity, this defendant says, with regard to:

First. The character and volume of business done over its aforesaid line or lines of road, that as to the articles of transportation included in the schedules set forth as aforesaid in complainant's bill of complaint, and being the articles constituting the greater bulk of the transportation and commerce of said city of Wichita and vicinity, they do not, and would not, in the due and actual course of business, and under the existing commercial conditions, compete in the St. Louis markets with the said city of Omaha or its locality or vicinity; and that said cities of Wichita and Omaha and
41 their localities or vicinities do not in any sense become competitors for any business between the said city of St. Louis and the said cities of Wichita and Omaha.

That owing to natural and actual controlling commercial conditions, more particularly hereinafter set forth, and independent of and uninfluenced by the rates complained of as fixed and enforced by this defendant, there is practically no business between the said city of Wichita and the said city of St. Louis in the transportation of agricultural products, live stock and the products of animals, and packing-house products generally, grain in bulk and coal;

Wherefore, this defendant, expressly denying that it by any mode or means discriminates in favor of said city of Omaha against said city of Wichita, or by any mode or means exercises undue preferences to the detriment and hindrance of commerce and trade between said cities and between said localities, or that it in any manner subjects the said localities of Wichita and St. Louis to any unreasonable and undue prejudice and disadvantage by reason of the alleged fact that the charges made in pursuance of said tariff rates, rules and regulations are in excess of the charges made by it for like and contemporaneous service for the transportation of property between the city of Omaha and the city of St. Louis under substantially similar circumstances and conditions, as it is alleged, alleges the fact to be that there is no possible relation of commerce, or of business, or competition, existing between the said cities of Omaha and Wichita upon which a charge either of discrimination or undue or unreasonable preference, prejudice or disadvantage may be predicated, but that upon the contrary there is little or no competition whatever between the two cities in any St. Louis market, or other market, wherein the rates between the said cities and the city of St. Louis are involved, and that the schedule or schedules referred to, and

the rates which this defendant so made or makes, between the cities of St. Louis and Omaha do not operate in any manner directly or indirectly to affect either the prosperity of the city of Wichita, the people interested in her municipal welfare, or the sale or prices of her products or commodities in any market or markets in the country.

This defendant further alleges the fact to be, with respect to the comparative volume of business, that there is and was at the time of the filing of said bill of complaint, a vast difference in the volume of freight moved and handled by and over defendant's line
42 or lines of road between said cities of St. Louis and Wichita, and St. Louis and Omaha, being the line or lines in question;

That of the products of the forest, products of animals, including live stock, agricultural products, manufactures and merchandise, and all classifications under the head of miscellaneous articles of freight, being the total of all kinds and classes of freight, including the schedules set forth and complained of in said complainants' bill inclusive, there was moved from St. Louis to Wichita, a sum total of 3,237,630 lbs. during the six months ending December 31st, 1893; and from St. Louis to Omaha, there was, of these products, a total sum of 48,326,305 lbs., or in favor of Omaha over Wichita a total of 45,088,675 lbs.

That during the same period of time there was of the same products handled by and moved over the same line or lines of defendant's road from Wichita to St. Louis the sum total of 1,528,180 lbs., and from Omaha to St. Louis, a sum total of 20,674,240, making a sum total of 19,146,060 lbs. in favor of Omaha and against Wichita;

That during the years 1894 and 1895 the proportion or ratio of the total tonnage of Omaha to Wichita has increased, especially for the year 1894.

That there is likewise a vast difference in the volume of freight forwarded from and received at Wichita and Omaha during the same period or periods of time;

That during the six months ending December 31st, 1893, there was moved from Wichita over defendant's line or lines of road to all points, of the same classifications of products and articles, a sum total of 12,052,910 lbs.; from Omaha to all points 117,582,258 lbs., leaving a balance in favor of Omaha over Wichita of 105,529,348 lbs.; and from all points to Wichita the sum total of 44,499,229 lbs., and from all points to Omaha a sum total of 431,939,348 lbs., or a total in favor of Omaha over Wichita of 387,440,119 lbs.

That during the year ending December 31st, 1894, the balance in favor of Omaha over Wichita on like classifications and shipments of freight was 675,661,978 lbs.; and for the year ending December 31st, 1895, a balance on like classifications and shipments of 626,207,761 lbs.; that Wichita exceeded Omaha in no article of freight, except bulk grain for the six months ending December 31st, 1893, and flour and grain in the year 1894, and flour and grain in the year 1895 from and to points, St. Louis excepted.

This defendant further avers and charges the fact to be that there

is a vast difference in volume of business and of tonnage and
43 of freight forwarded from St. Louis on that part of the line or lines described in complainant's bill of complaint as running from Holden to Omaha, and hereinafter denominated the Nebraska-Omaha extension, and that branch described as running from Holden and Kansas City to Wichita, and hereinafter denominated the Kansas-Wichita branch;

That that part of defendant's line or lines described in complainant's bill, and extending from Holden, Missouri, or near Holden, to Omaha, is a part of what is known as the main line of the Missouri Pacific Railway system;

That upon all parts of the main line, and especially that part of it described, the traffic and business is and has been for years greatly in excess of the traffic and business on its branch lines, and especially on the branch line described in said bill as running from Holden, Missouri, to the city of Wichita;

Also that on that part of the main line so described running from Atchison, Kansas, to Omaha, hereinafter referred to as the Nebraska-Omaha extension, together with the branch lines, being known as the Lincoln and Crete branches, Nebraska City and Omaha Southern lines or branches, the number of tons forwarded from stations to Omaha was as follows:

During the year 1893 ..... 520,280 tons.
During the year 1894 ..... 474,786 tons.
During the year 1895 ..... 306,780 tons.

That the number of tons forwarded from stations on what is called the Fort Scott, Wichita & Western division, Fort Scott to Kiowa, including the McPherson branch, and being all that portion of defendant's line described in said bill of complaint, was as follows:

During the year 1893 ..... 138,856 tons.
During the year 1894 ..... 110,222 tons.
During the year 1895 ..... 87,630 tons.

Leaving in favor of the Omaha extension as against the Wichita branch, a sum total of:

During the year 1893 ..... 381,424 tons.
During the year 1894 ..... 364,564 tons.
During the year 1895 ..... 219,150 tons.

That the number of tons received at stations on the Nebraska-Omaha extension for the city of Omaha was as follows:

During the year 1893 ..... 737,501 tons.
During the year 1894 ..... 583,302 tons.
During the year 1895 ..... 528,247 tons.

44 That the number of tons received on the Kansas-Wichita branch for the city of Wichita was as follows:

During the year 1893 ..... 145,340 tons.
During the year 1894 ..... 117,373 tons.
During the year 1895 ..... 122,126 tons.

Showing a sum total in favor of the Nebraska-Omaha extension against the Kansas-Wichita branch of:

During the year 1893 ..... 592,161 tons.
During the year 1894 ..... 465,929 tons.
During the year 1895 ..... 406,121 tons.

That the total tons handled over the Nebraska-Omaha extension as per above *was:*

During the year 1893 ..... 1,257,781 tons.
During the year 1894 ..... 1,058,088 tons.
During the year 1895 ..... 835,027 tons.

And the total tons handled over the Kansas-Wichita branch *was:*

During the year 1893 ..... 286,196 tons.
During the year 1894 ..... 227,595 tons.
During the year 1895 ..... 209,756 tons.

Leaving a total in favor of the Nebraska-Omaha extension over the Kansas-Wichita branch of:

During the year 1893 ..... 973,585 tons.
During the year 1894 ..... 830,483 tons.
During the year 1895 ..... 625,271 tons.

That the volume of Nebraska-Omaha Extension business for the year 1893 as compared with the Kansas-Wichita Branch business shows 442.6 per cent.;

That the volume of Kansas-Wichita Branch business for the year 1893 as compared with the Nebraska-Omaha Extension business shows only 22.6 per cent.;

That in the years 1894 and 1895 the ratio was substantially the same;

That the volume of business on that part of defendant's line or lines described in said bill of complaint as running from Holden to Omaha which extends from Holden to the city of Atchison, is greatly in excess of that part from Atchison to Omaha, being as nearly as can be approximated, at least 33⅓ per cent. over the Nebraska-Omaha extension on all classifications of freight, and that the mileage upon which the foregoing table is based is greater from Holden to Wichita than from Atchison to Omaha.

Second. That as to cost of service:

45 This defendant for greater particularity, states that the average earnings per ton on the Missouri Pacific main line, including the line to Omaha in question, were:

During the year 1893..... $1.37 44-100
During the year 1894..... 1.46 36-100
During the year 1895..... 1.46 87-100

The average expense per ton on the same was:

During the year 1893..... 1.15 61-100
During the year 1894..... 1.21.78-100
During the year 1895..... 1.23 56-100

The average net earnings per ton on the same were:

During the year 1893	.21 83-100
During the year 1894	.24 58-100
During the year 1895	.23 31-100

That the average earnings per ton on the Kansas-Wichita branch or branches in question in this suit were:

During the year 1893	1.08 76-100
During the year 1894	1.12 54-100
During the year 1895	1.18 71-100

That the average expenses per ton on the same were:

During the year 1893	$1.34 24-100
During the year 1894	1.36 17-100
During the year 1895	1.41 41-100

That the average net loss per ton on the same was:

During the year 1893	.25 48-100
During the year 1894	.23 63-100
During the year 1895	.22 70-100

That the average earnings per ton per mile on the main line of the Missouri Pacific railway, including the line to Omaha and in question in this suit, were:

During the year 1893	0.00 85-100
During the year 1894	0.00 92-100
During the year 1895	0.00 99-100

That the average expense per ton per mile on the same was:

During the year 1893	0.00 72-100
During the year 1894	0.00 76-100
During the year 1895	0.00 83-100

That the average net earnings per ton per mile on the same were:

During the year 1893	0.00 13-100
During the year 1894	0.00 16-100
During the year 1895	0.00 16-100

46 But that the average earnings per ton per mile on the Kansas-Wichita branch line or lines in question in this suit were:

During the year 1893	0.01 02-100
During the year 1894	0.01 10-100
During the year 1895	0.01 10-100

That the average expense per ton per mile on the same was:

During the year 1893	0.01 25-100
During the year 1894	0.01 33-100
During the year 1895	0.01 36-100

That the average loss per ton per mile on same was:

During the year 1893	0.00 23-100
During the year 1894	0.00 23-100
During the year 1895	0.00 26-100

That the difference in the aforesaid net earnings and expenses on the aforesaid line or lines of road is further augmented by the following facts, circumstances and conditions:

(1.) That on the Nebraska-Omaha extension cars for Omaha are loaded on an average of about 17 per cent. heavier than those for Wichita on said Kansas-Wichita branch, and at least 25 per cent. heavier on that part of the main line between Holden and Atchison.

(2.) The volume of business done and the fact that the net expense of service in moving shipments is reduced in the ratio of the volume and tonnage of the business done.

(3.) That on the main line and Nebraska-Omaha extension a larger per cent. of the shipments are in car-load lots and handled by the shipper himself, whereas on the Kansas-Wichita Branch line or lines there is a larger per cent. of less than car-load shipments which in all cases must be handled by the carrier.

(4.) That by reason of the foregoing the labor and expense of consequent additional switching and handling of cars at stations on the Kansas-Wichita branch is necessarily incurred, thereby increasing the cost of service to the defendant and requiring corresponding increase in the cost of carriage to the shipper.

Also on the Kansas-Wichita business the volume is such that it is necessarily handled in local trains, whereas on the main line and Nebraska-Omaha extension the volume and character of the shipments enable the defendant to handle the business in through trains, thus obviating the time, labor and expense of frequent handling.

47 (5.) The local business from the numerous large towns on the main line and the line described in complainants' bill, being the Omaha extension, is greatly in excess of the business of the Kansas-Wichita Branch line or lines.

(6.) There are also advantages on the main line and the Nebraska-Omaha extension thereof in favor of that line in the number of what are known as deliveries of freight to connecting lines, there being a great many more connections with other lines favorable to connecting deliveries than on the Kansas-Wichita line or lines.

(7.) That the maximum and length of grades in a line of road of the length of the Kansas-Wichita branch directly affects the cost of transportation, the cost of service being in the ratio of the maximum of grade.

That the maximum on said branch is 1.70 % based on a minimum of 0.78 %, and a total of 364,720 lineal feet, as shown by the table hereto attached, marked Exhibit "A" and made part of this answer.

That the maximum on the Nebraska-Omaha extension is 1.26 % based on the same minimum, and a total of 179,800 lineal feet, as shown by the table hereto attached, marked Exhibit "B" and made

a part of this answer; and that the maximum on that part of the main line from Holden to Atchison is still less than on the Nebraska-Omaha extension from Atchison.

This defendant charges and alleges the fact to be that the rates, charges and schedules on the aforesaid Nebraska-Omaha extension from Holden to Omaha are not only reasonable and just to the shipper and the public at large, but are in respect of revenue to the company unjustly and unreasonably reduced so that they are in fact, as hereinbefore alleged, not fairly compensatory for the service rendered.

That as to the Kansas-Wichita Branch line, and being that part of the line from the main line at Pleasant Hill near Holden to Wichita, a reduction of said rates, charges and schedules, and the establishment of a permanently reduced rate and schedule, would be oppressively unjust and unreasonable and could not be adopted and put into effect by it without serious and irreparable injury to and destruction of the property, rights and interests of the owner thereof and the owners and holders of its first and second mortgage bonds and stock, as more fully hereinafter appears.

That the length of the aforesaid branch line of road is 234 miles.

48 That there is a first mortgage and bonded indebtedness upon said line of road at the rate and amount of $15,000 a mile.

That there is a second mortgage and bonded indebtedness on that part of said line known as the Fort Scott and Wichita division, and being that part of the line between Fort Scott and Wichita, of approximately the sum and amount of $3,000 per mile.

That there is issued for each and every mile of said branch line approximately the sum and amount of $16,000 of capital stock on the whole of said branch line.

That said first-mortgage bonds bear interest at the rate and amount of 5 % per annum; and that said second-mortgage bonds bear interest at the rate and amount of 6 % per annum, payable semi-annually.

That said branch line so described as the Kansas-Wichita line extends not only to Wichita, but in a southwesterly direction from there to Kiowa, Kansas, a distance of 87 miles; and from El Dorado, Kansas, it extends in a northwesterly direction to McPherson, Kansas, a distance of 62 miles.

That this line together with these extensions, is operated by this defendant, and has been for a number of years.

That a like mortgage incumbrance and issue of stock has been made upon said extensions, and at the same time.

That the expense of operation, tonnage, volume of business and earnings are even less per mile on said extensions than on the line to Wichita, and the expenses of operation ratably increased as the line or lines proceed westerly.

That there is no adequate advantage to the owner or owners of said bonds and stock, or the operator of said branch line, by reason of any connections which it may have with any other line or lines

of defendant or other company, or as a feeder, to compensate for any reduction of rates or charges whatever, or in any measure justifying any reduction.

That the said bonds and stock were issued for and represent value; and that the existing rates and schedules were not sufficient to enable the owner or operator of said property to pay all the interest on said bonds.

That at no time have the holders of said stock been able to collect or receive any dividends thereon, but upon the contrary the owners of said property and said bonds and stock have been forced
49 to advance large sums of money for the purpose of providing in part for the interest and the operation of said road for which they have not been reimbursed.

That there *has* been necessarily expended in cash in the construction and equipment of said line of road approximately $40,000 per mile; and that the same could not be replaced for less than approximately $30,000 per mile, and that the earnings of said road are not sufficient to provide for its necessary operation, betterments and maintenance;

That at all times the services of its officers and employés have been procured as cheaply as practicable, and no more employed than necessary, and at fair and reasonable rates of compensation, and that in every respect said property has been operated and maintained at the lowest possible cost.

Wherefore, and upon all the grounds, and for all the reasons above set forth, and upon all the facts, this defendant alleges that each and all of the rates, charges, schedules and classifications enforced by it at the time complained of were in no case unreasonable or unjust; that they were not in restraint of a free, fair and unprejudiced movement of all commodities affected thereby; that the same were not, and are not, sufficient to enable this company to pay the charges of operation, maintenance, betterments, taxes, and interest, as aforesaid; and that if it should be compelled to reduce its revenues by a material reduction of its rates and schedules as prayed for in said bill, or to meet the rates and schedules necessarily in force under the dissimilar circumstances and conditions hereinbefore described as obtaining upon the Nebraska-Omaha line, and the Omaha-St. Louis business, and that of intermediate points, its revenues would be so reduced and diminished as to entail upon it unavoidable bankruptcy, and prevent the maintenance of the property in proper order and good working condition so that the traffic and business of the road and every part thereof would at all times be done with safety and expedition, and that the enforcement of such diminished rates would be in effect a confiscation and appropriation to the use of others of said property, or at least of a portion of the capital invested by its owners, and by said stock and bondholders, and the taking of the same without due process of law and without adequate compensation being made therefor; would operate to deny to the owners of said property and those who have invested their means as aforesaid the equal protection of the laws, and would be contrary to and in viola-

tion of the constitution and laws of the State of Kansas and of the United States.

50 Third. As to the competition of many independent lines of road, and of water transportation, this defendant, for further particularity of fact, further says:

The relative rates between the said cities of St. Louis and Omaha, and the said cities of St. Louis and Wichita, are further controlled by the further following facts, circumstances and conditions, to wit:

The Mississippi river is the basing line for all rates for territory lying west thereof between it and the Missouri river, and the Missouri river is the basing line of all rates between it and Wichita;

That the rating of all shipments of freight originating in the middle and eastern States having destination in the States of Iowa and Nebraska and other trans-Mississippi territory is found by adding the rate from point of origin to the Mississippi river, and the rate from the Mississippi river to the point of destination.

That the rates to the cities located on the Mississippi river, from Clinton, Iowa, on the north, to St. Louis on the south, both inclusive, on business from the manufacturing and other industrial districts in the middle and eastern States destined to the Missouri river, are alike to all, and this defendant has no part in making the same.

That all the Mississippi River cities located within these limitations are entitled by location and otherwise to compete, and do compete, for the trade of the cities located on and west of the Missouri river, Omaha to Kansas City inclusive, so that the rate to any one of them must of necessity be no higher than those governing from any of the others in order to permit shipment to them of products and freight from the east, and reshipment thence to the consuming territory; and this defendant has no power to prevent or change this condition.

That the measure of the rate charged from such Mississippi River crossings to Omaha is the schedule and rate maintained by the short lines from the principal Mississippi River crossings across the State of Iowa to Omaha;

That the distance of some of these, for instance, from Burlington to Council Bluffs, Iowa, via the C. B. & Q. R. R. is but 293 miles; from Davenport, via the Rock Island railway 316 miles; from Clinton, Iowa, via C. & N. W. R. R. 350 miles;

That the distance from St. Louis to Omaha, via the Wabash railroad, which is the short line, is only 280 miles, which line, by

51 reason of being the short line, absolutely controls the tariff between the said cities of St. Louis and Omaha; and this defendant is powerless to alter or prevent it;

That the Missouri Pacific railway from St. Louis to Omaha runs through an agricultural territory and serves many important business centers, as, for instance, Jefferson City, Sedalia, Kansas City, Atchison and St. Joseph;

That owing to the large amount of local business of all kinds, and the further fact that the service for the local business is utilized for the through business, the train service having to be maintained for the local business, the compensation for the total through business

and local business is barely compensatory upon the basis of the aforesaid schedules, as shown by the foregoing tables;

That this defendant is compelled to take and do business at the rate of such schedules or withdraw from that territory;

That such withdrawal would simply result in lifting the Missouri Pacific railway out of such traffic without accomplishing any corresponding benefit to the city of Wichita or to the public in general;

That these are conditions, circumstances and environments entirely beyond the control of this defendant, and are conditions that do not exist as to the city of Wichita, or Wichita business, either from St. Louis or the eastern seaboard;

That as between the said cities of Omaha and Wichita there is the further differences that the Missouri river is what is known as a "basing line" which extends from all Missouri River points to Kansas City, and thence southerly through the cities of Fort Scott, Kansas, and Joplin, Missouri; and this defendant had nor has not any part in making it such;

That the city of Wichita lies about — miles from what is known as "the Missouri River basing line;"

That tariff at the Missouri River basing line is influenced largely, not only by volume of business, competition, cost of transportation and other elements affecting the rates, but also by the fact that the Missouri river is in fact in a measure, and potentially in a much larger measure, favored by water transportation;

That all these conditions are recognized by the Board of Interstate Commerce Commission, and the courts, and by shippers and carriers universally as legitimate controlling factors of traffic and commerce in the Mississippi and Missouri River valleys;

52 That the city of Omaha is likewise affected by the same condition, being located upon the Missouri river;

That the rates west of the Missouri River crossings and "the Missouri River basing line," extended as aforesaid, and the city of Wichita, are necessarily still further augmented by the following conditions, to wit:

The following lines of railway run into and through the city of Wichita, and did so run at the time of filing said bill of complaint:

The Missouri Pacific railway, over the Kansas & Colorado Pacific railway;

The Atchison, Topeka and Santa Fe railway;

The St. Louis and San Francisco railway; and

The Chicago, Rock Island & Pacific railway;

That all of these lines are branch lines except the St. Louis and San Francisco, and the Chicago, Rock Island & Pacific railroads, which former road is now, and was at the time of the filing of said bill of complaint, controlled and operated by the Atchison, Topeka & Santa Fe Railroad Company;

That of these, only two, the Missouri Pacific and the St. Louis and San Francisco railroads run between the cities of Wichita and St. Louis;

That of these only the Missouri Pacific and the Chicago, Rock

Island & Pacific railway connect with both the city of Omaha and the city of Wichita.

Fourth. That as to commercial advantages, geographical position, climatic conditions of the respective cities of Wichita and Omaha, together with other like substantially dissimilar conditions and circumstances, this defendant, for greater particularity, further says:

That the intermediate towns between the Missouri river and the city of Wichita are generally much less numerous and of much less commercial importance than upon the line between St. Louis and Omaha; that the country is much more sparsely settled; that while the country in the region of Wichita, and for a large part of the distance between the Missouri river and Wichita, is wholly an agricultural country, without any mineral resources whatever, the crops, especially in the vicinity of Wichita, and the country tributary thereto, have been exceedingly uncertain and precarious; that the fuel consumed in the operation of defendant's line of railway between the eastern line of the State of Kansas and the city of Wichita has to be hauled onto its lines at great expense, and that owing
53 to the reduced and restricted volume of business it is necessary to handle much of the freight both in and out in less than car-load and less than train-load lots, thus greatly increasing the expenses of service; that these unfavorable conditions do not as a rule obtain with reference to the city of Omaha; that the population of the city of Wichita is probably only about half the population of the city of Omaha; that the said city of Wichita has not so many through main lines of railroad as the city of Omaha; that said city of Omaha is located upon the Missouri river, potentially navigable, if not in fact, in the center of a large agricultural area and convenient to coal and other fuels, but that the city of Wichita is a long distance from any navigable stream, potential, or in fact; often with insufficient water supply, and insufficient and deficient fuel and timber supply for train service; that the said city of Omaha has, as this defendant is informed and believes, large and flourishing stock yards and packing-houses, but the packing-houses and stock yards of the city of Wichita have, not by reason of the alleged discriminations, as charged, but, as this defendant is informed and believes, by reason of the recent repeated and continued failure of crops almost if not quite suspended operation; that many other dissimilar conditions and circumstances exist; that these are conditions and environments entirely beyond the control of this defendant; that the circumstances and conditions, therefore, under which the Omaha-Wichita freight rates are handled are not substantially similar, but substantially and wholly dissimilar.

This defendant, further denying, as alleged in said bill of complaint, that but for the acts complained of, the said city of Wichita would carry on a large and profitable trade in the market furnished by St. Louis for live stock and for all classifications of freight, and that said defendant's railroad between said cities of St. Louis and Wichita with its western and southern connections with other roads at the city of Wichita, would, but for such fact, constitute one of the principal thoroughfares in freight traffic between the Mississippi

river and the Pacific ocean, and between the Mississippi river and the gulf of Mexico at the city of Galveston, alleges the fact to be that its line of railroad from the city of St. Louis to the city of Wichita has no direct, through or continuous line or connection, and no direct operation between the Mississippi river and the western seaboard, or Pacific coast, or the gulf of Mexico, or the city of Galveston, either over its own lines or over the lines of other roads, so as to be able to control, fix or make through tariffs, and that its own lines of road running to the city of Wichita end at the town of Kiowa, on the southwest, and the town of Kanopolis on the northwest;

54 And this defendant, further expressly denying that by reason of any unjust or excessive charge for freights, or any unreasonable or unjust preferences or discriminations, as charged in said bill of complaint, the said city of Wichita has been limited or restricted as a distributing point for central and southern Kansas, or the Indian Territory or Oklahoma, or that it has by virtue of said schedules prevented it from furnishing, as alleged, an extensive market with freight of all classifications, or limited or restricted the use or usefulness of its stock yards, or its shipments of live stock, as alleged in said bill of complaint, alleges the fact to be that if it has been restricted, as this defendant does not doubt that it has, as a general distributing point for either southern Kansas, or the Indian Territory, or Oklahoma, or all of these, or as a market for freight of any kind, or if the stock yards located at said city of Wichita have not done the business which they may have done in former and more prosperous times, these conditions are not attributable to any charges or schedules which it makes either to or from Wichita, or to or from said city of Omaha, as it is alleged, but altogether to conditions, causes, influences and environments over which this defendant has no control, and which inhere wholly in location, climate, market, distance, cost of service, competition, volume of trade, and other environments hereinbefore set out for which this defendant is in no manner responsible.

And this defendant further expressly denies that the schedules or rates complained of in said bill of complaint are in any manner detrimental to commerce or trade, or in any way directly or indirectly hinder commerce or trade to the injury of the localities or the municipalities in question, or the public at large, or the people of the United States, or the United States of America.

III.

Defendant further avers and shows that no complaint has ever been filed with the Interstate Commerce Commission of anything done or omitted to be done by defendant company in respect of said schedules in contravention of the provisions of the interstate-commerce act, and as required by law;

That no such complaint has ever been by said commission forwarded or presented to this defendant, or demand made upon it for reparation for any alleged injury as required by law;

That the Interstate Commerce Commission never as matter of fact investigated such, or any, complaint, or the alleged question at

issue between this defendant and the city of Wichita, in fact, or as required by law;

55 That said commission has never made an order, recommendation, report or finding upon the issues between the complainants and this defendant, as required by law;

That it never was in fact made to appear to the satisfaction of the commission that anything had been done or omitted in violation of the act or of any law cognizable by the commission, or that any injury had ever been sustained by the complainants, as required by law;

That no notice was given to cease or desist from any alleged violation, or to make reparation for any alleged injury within any time named by the commission, or any opportunity given this defendant to make reparation for any alleged injury within any time named by the commission, as required by law;

That this defendant never violated or refused or neglected to obey or perform any lawful order or requirement of the commission, or of any court, relating thereto;

That the schedules complained of in the bill of complaint herein have been lawfully made, published and approved by the Interstate Commerce Commission, as required by law;

That said commission has never, agreeably to the provisions of the law in that regard, duly caused a properly authenticated copy of any report in respect of the matters at issue in said complaint, together with any order or notice aforesaid, to be delivered to this defendant;

That such schedule had been for years prior thereto, and was at the time of the filing of said bill of complaint, in full legal force and effect unimpeached by the commission, or by any court, and that no charge had ever been made or proven that it was illegal or unjust or discriminatory in its character;

That no order has ever been made by the commission in relation thereto, as required by law.

Wherefore, and by reason of the aforesaid matters and things, this defendant is advised by counsel and therefore avers, that the act under which and upon which it is alleged in said bill of complaint this suit is founded, does not authorize or empower the commission or the Attorney General of the United States, or the United States attorney for the district of Kansas, to institute this suit.

And this defendant is advised by counsel and therefore avers that neither by virtue of said act nor any other right or power has this court jurisdiction, nor can it draw unto itself jurisdiction under the facts and circumstances presented by said bill of complaint and the issues hereby joined to hear and determine this suit.

56 IV.

This defendant is advised by counsel and therefore avers that the United States of America has no just cause of complaint against this defendant;

That this defendant has never either directly or indirectly, by making or enforcing the schedules complained of in this bill of com-

plaint, done injury to either the United States of America or any officer thereof, nor to the public at large; and that the United States of America, having no just cause of action or of complaint either at law or in equity against this defendant by reason of making or enforcing the schedules, tariffs and rates charged in said bill of complaint, is unduly and unjustly harassing and oppressing this defendant in an illegal and unjustifiable prosecution of this suit.

V.

Defendant further alleges and charges the fact to be that the issues involved in this suit cannot be fairly determined for the reason that the railway companies who are responsible for the rates and schedules in question are not parties hereto and should be made parties in order to a full and complete determination of the issues;

That the following-named carriers are responsible for the rates to Wichita from the Mississippi and Missouri River crossings:

The Chicago, Rock Island & Pacific Railway Company;
The Atchison, Topeka & Santa Fe Railway Company;
The St. Louis & San Francisco Railway Company.

And inasmuch as any change in the rates to Wichita will seriously and generally affect the rates of freight all over the State of Kansas, all other lines interested in traffic to and from the State of Kansas should necessarily become parties to this suit, viz.:

The Missouri, Kansas & Texas Railway Company;
The Kansas City, Fort Scott & Memphis Railway Company;
The Union Pacific Railroad Company;
The St. Joseph & Grand Island Railway Company;
The Kansas City Northwestern Railway Company;
The Burlington & Missouri River Railroad Company;
The Hutchinson & Southern Railroad Company;
The Kansas City, Pittsburg & Gulf Railway Company.

And inasmuch as the final determination of this suit is likely to affect the rates between the cities of Omaha and St. Louis, and inasmuch as the lines running between the Mississippi River
57 crossings between Clinton, Iowa and St. Louis and Omaha, inclusive, and the city of Omaha, make and control the rates, tariffs and schedules on all classifications of freight between the city of St. Louis and the city of Omaha over defendant's lines of railway and it is powerless to make or reduce the rates such lines are indispensable parties to the complete and final determination of the rates involved, and should be made parties to this suit. They are:

The Wabash Railroad Company.
The St. Louis, Keokuk & Northwestern Railway Company.
The Burlington & Missouri River Railroad in Nebraska.
The Chicago, Burlington & Quincy Railway Company.
The Illinois Central Railway Company.
The Chicago, Milwaukee & St. Paul Railway Company.
The Chicago & Northwestern Railway Company.
The Fremont & Elkhorn Valley Railroad Company.
The Chicago, St. Paul, Minneapolis & Omaha Railway Company.

The Chicago & Great Western Railway Company.
The Chicago & Alton Railway Company.

Wherefore this defendant asks and prays this honorable court to make an order of intervention requiring the complainants herein to make all of said railway and railroad companies codefendants to this suit, and avers that each and all of such parties and companies are indispensable, as the radical change involved, or, indeed, any change, would not only seriously affect and upset rates in all said territory, but likewise seriously affect shippers, and shipping interests, in all said territory.

VI.

This defendant specially and expressly denies that the wrongs herein complained of are remediless in the premises at law or only relievable in a court of equity, and under the form of procedure instituted, but alleges the fact to be that the real party in interest, to wit: the municipality and locality of Wichita, together with any and all other persons or parties having any pretended or just cause of action against this defendant, and as well, also, the complainants, The United States of America, have under and by virtue of the provisions of the aforesaid interstate-commerce act, and in the courts of the State of Kansas, easy, adequate and complete remedies at law for every possible form of excessive charge, discrimination or undue preference, and for the correction or amendment of any alleged unlawful or oppressive schedule, rate or tariff.

58 And this defendant is advised by counsel and avers the fact to be that under the law in such cases made and provided and applicable to proceedings for the prevention of unreasonable charges or unlawful discrimination or undue preference, this court is without jurisdiction to hear and determine this cause without the same having first been submitted to and passed upon by the Board of Interstate Commerce Commission as specifically provided by the terms of said act.

Wherefore this defendant, having fully answered to said bill of complaint in so far as it is advised the same is material and necessary to be answered unto, denies that the said complainant is entitled to the relief, or any part thereof, in said bill of complaint demanded, or any relief whatsoever; prays the same advantage of its aforesaid amended answer as if it had pleaded and demurred to said bill of complaint, and prays to be hence dismissed with its most reasonable charges in this behalf most wrongfully sustained.

THE MISSOURI PACIFIC RAILWAY
COMPANY, *Defendant*,
By B. P. WAGGENER,
C. E. BENTON,
J. H. RICHARDS, *Its Solicitors*.

THE UNITED STATES OF AMERICA, }
Second Division for the District of Kansas. }

On this 16th day of January, 1897, before me, the undersigned, a notary public, at Fort Scott, Kansas, appeared the within-named J. H. Richards, and made oath:

That he is the general attorney of the defendant, The Missouri Pacific Railway Company, and vice-president of the main line of road in question within the State of Kansas.

That he signed the said amended answer as such officer by authority of the said company.

That he has read the same and knows the contents thereof, and the matters stated therein as of his own knowledge are true, and as to the matters stated upon the information of others he believes to be true.

J. H. RICHARDS.

Subscribed and sworn to before me this 16th day of January, 1897.

[SEAL.] GEO. O. BACON,
Notary Public, Bourbon County, Kansas.

My commission expires Aug. 6, 1899.

59 EXHIBIT "A."

Kansas City to Wichita via Pleasant Hill, Rich Hill, & Ft. Scott. Statement of grades exceeding 0.78%. Maximum grade, 1.70%.

Gradient.	Length.	Location.
1.70%	1200 ft.	East of crossing of Robinson creek, Ft. S. W. & W. r'y.
1.56% grade.	1000 "	1¼ mile south of Independence, main line Mo. Pac. r'y.
1.50% grade.	1200 "	¼ mile west of Ft. Scott shop grounds, Ft. S. W. & W. r'y.
	100 "	In N. W. ¼ sec. 28, twp. 25 S., range 24 E., Ft. S. W. & W. r'y.
	1100 "	In N. ½ of sec. 29, twp. 25 S., range 24 E., Ft. S. W. & W. r'y.
	1000 "	1 mile west or Marmaton station, Ft. S. W. & W.
Total.....	3400 lin. ft. of 1.50% grade.	
1.49% grade.	1700 ft.	1 mile south of Marmaton Creek crossing, Ft. S. W. & W. r'y.
1.45% grade.	2000 "	1 mile west of Uniontown, Ft. S. W. & W. r'y.
	6000 "	East of Yates Center, Ft. S. W. & W. r'y.
Total	8000 lin. ft. of 1.45% grade.	
1.40% grade.	800 " "	East of Iola, Ft. S. W. & W. r'y.
1.39% grade.	1300 " "	In S. W. ¼ of sec. 32, twp. 24 S., range 21 E., Ft. S. W. & W. r'y.
1.38% grade.	1300 lin. ft.	2000 ft. south of Springs sta., Mo. Pac. main line.
1.36% grade.	3900 " "	North of Springs sta., Mo. Pac. main line.
1.35% grade.	4400 ft.	1 mile south of Springs sta., Mo. Pac. main line.
	850 "	1¼ mile north of Butla sta., Lex. & Sou. div.
Total	5250 lin. ft. of 1.35% grade.	

1.34% grade.	3800 " "	4 miles south of Independence, Mo. Pac. main line.
1.32% grade.	2100 ft.	South of Springs sta., Mo. Pac. main line.
	900 "	1¼ mile south of Adrian sta., Lex. & Sou.
	300 "	South of Ovid sta., Lex. & Sou. div.
	1030 "	2½ miles east of Uniontown, Ft. S. W. & W. r'y.
Total....	4330 lin. ft. of 1.32% grade.	

Gradient.	Length.	Location.
1.30% grade.	5300 ft.	4½ miles south of Independence, Mo. Pac. main line.
	600 "	4¾ miles west of Ft. S. W. & W. r'y.
	700 "	¼ mile west of Uniontown, Ft. S. W. & W. r'y.
	1900 "	In S. W. ¼ of sec. 33, twp. 24 S., range 21 E., Ft. S. W. & W. r'y.
	1400 "	In S. ½ of sec. 32, twp. 24 S., range 21 E., Ft. S. W. & W. r'y.
	2600 "	8¾ miles west of Fall River crossing, Ft. S. W. & W. r'y.
	1500 "	9½ miles west of Fall River crossing, Ft. S. W. & W. r'y.
	300 "	9¾ miles west of Fall River crossing, Ft. S. W. & W. r'y.
	3500 "	10¾ miles west of Fall River crossing, Ft. S. W. & W. r'y.
	4500 "	In E. ½ and N. W. ¼ of sec. 12, twp. 26 S., range 8 E., Ft. S. W. & W. r'y.
	1300 "	In E. ½ of N. W. ¼, sec. 2, twp. 26 S., range 8 E., Ft. S. W. & W. r'y.
	7600 "	In N. ½ of sec. 4, and N. E. ¼ of sec. 5, twp. 26 S., range 8 E., Ft. S. W. & W. r'y.
Total....	31,200 lin. ft. of 1.30% grade.	

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1.28% grade.	1700 lin. ft.	1¼ mile east of Moran, Ft. S. W. & W. r'y.
1.25% grade.	4400 ft.	1½ mile north of Little Blue station, Mo. Pac. main line.
	800 "	1½ miles south of Bone Fork Creek crossing, Lex. & Sou. div.
	1500 "	South of Wild Cat Branch crossing, Lex. & Sou. div.
	2300 "	N. E. ¼ of sec. 27, twp. 25 S., range 24 E., Ft. S. W. & W. r'y.
	100 "	West of Uniontown, Ft. S. W. & W. r'y.
	2800 "	1¼ mile west of Bronson, Ft. S. W. & W. r'y.
	1300 "	East of La Harpe, Ft. S. W. & W. r'y.
	1400 "	1¼ mile west of La Harpe, Ft. S. W. & W.
	1100 "	2½ miles " " " "
	5200 "	In N. ½ of sec. 3, and E. ½ of N. E. ¼ sec. 4, twp. 26 S., range 8 E., Ft. S. W. & W.
Total....	20,900 lin. ft. of 1.25% grade.	

Grades between 0.78% and 1.25%, total lin. ft. 364,720 ft.

EXHIBIT "B."

Mo. Pac. main line, Kansas City to Omaha. Statement of grades exceeding 0.78%. Maximum grade, 1.26%.

Gradient.	Length.	Location.
1.26% grades.	500 ft.	North of Portal station.
	1600 "	1 mile north of Portal station.
	1100 "	1¼ mile north of Portal station.
Total....	3200 "	

1.25% grades.	10400 ft.	Between M. P., 332 and 334.
	2800 "	East of " 339.
	1600 "	West of " 334.
	1200 "	East of " 345.
	4800 "	Between " 345 and 346.
	2000 "	Both sides of M. P., 364.
	1300 "	¼ mile north of M. P., 444.
	3800 "	Both sides of M. P., 446.
	900 "	Both sides of M. P., 448.
	2200 "	From point 600 ft. north of M. P., 448.
	12100 "	Between M. P., 450 and 453.
	1600 "	Both sides of M. P., 454.
	10000 "	Between M. P., 456 and 458.
	1100 "	North of line between Douglas and Sarpy Co's.
	1900 "	West of Milins Road crossing.
	1100 "	West of B. & M. R. R. crossing.
	2200 "	Between Leavenworth St. crossing and stock-yard ext., H. B.
	1900 "	Opposite Popleton Park add. to Omaha.
	900 "	Both sides of Walnut Hill station.
	1500 "	North of Military road overhead crossing, Omaha.
	1300 "	In Hitchcock's 1st add. to Omaha.
	400 "	North of Kendall St., Omaha.
	600 "	Both sides of Emmet St., Bedford place, Omaha.
	1800 "	Both sides of Druid Hill station.
	69,400 ft.	

Grades between 0.78 and 1.25; total linear ft. 179,800 ft.

Indorsed: 390. The United States of America *vs.* The Missouri Pacific Railway Company. Amended answer of The Missouri Pacific Railway Company, defendant. Filed Jan. 18, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

61 In the Circuit Court of the United States in and for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainants,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } In Equity.

The Replication of The United States of America, Complainants, to the Answer of The Missouri Pacific Railway Company, Defendant.

Replicants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of said defendant, for replication thereunto say that they do and will aver, maintain, and prove their said bill to be true, certain, and sufficient in the law to be answered unto by said defendant, and that the answer of the said defendant is uncertain, evasive, and insufficient in law to be replied unto by this replicant, without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed, or denied, is true; all which matters and things these replicants are ready to aver, maintain and prove, as this honorable court shall

direct, and humbly prays as in and by their said bill they have already prayed.

W. C. PERRY,
Solicitor for Complainants.

MORRIS CLIGGETT,
Of Counsel.

Indorsed: 390. The United States of America *vs.* The Missouri Pacific Railway Company. Replication. Filed Jan. 20, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

UNITED STATES OF AMERICA
vs.
THE MISSOURI PACIFIC RAILWAY CO. } No. 390.

Order.

For good cause shown it is now here ordered that the time of both parties to take testimony be and hereby is extended to and including June 10, 1897.

JNO. A. WILLIAMS, *Judge.*

Indorsed: No. 390. United States *vs.* Mo. Pac. R'y Co. Order extending time of parties to take testimony. Filed Mar. 8, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

62 In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainants,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } No. 390.

Stipulation.

Whereas, after joining issue upon the pleadings heretofore filed in the above-entitled suit, to wit: the original bill of complaint, the demurrer thereto, the original answer, the amended answer and the replication thereto, it has been determined by all of the parties to, and all of the parties interested in, said suit that it is desirable and best that the questions of law arising upon the bill of complaint as amended and a demurrer thereto be first finally adjudicated and put at rest by the circuit court of appeals of the United States and the Supreme Court of the United States;

Now therefore, it is hereby agreed and stipulated by and between the above-named complainants, by their solicitors, W. C. Perry and M. Cliggitt, and the above-named defendant, by its solicitors, J. H. Richards and C. E. Benton, that said complainants shall file an amended bill of complaint in said suit, to which said defendant shall file a demurrer, and that if the court before which said cause is now pending shall overrule said demurrer and allow the relief prayed for in said amended bill of complaint, then said defendant shall proceed to appeal said cause in due course, and that the party, com-

plainants or defendant, against which said circuit court of appeals shall decide adversely, shall if said party so desires, in due course appeal said cause for final determination to the Supreme Court of the United States.

And it is further hereby agreed and stipulated that pending said appeal and all the procedure incident thereto, the decree and order of said courts, whether it be said circuit court of the United States for the district of Kansas, or said circuit court of appeals, or said Supreme Court of the United States, if adverse to said defendant allowing and decreeing the reliefs and remedies prayed for in said amended bill of complaint, shall be suspended and not enforced against said defendant The Missouri Pacific Railway Company, and when a decision has been rendered in said suit by said circuit court of appeals, or by the Supreme Court of the United States if the cause is taken to that court, then it is further hereby agreed and stipulated that the decision and judgment of either or both of said courts if adverse to said defendant The Missouri Pacific Railway Com-
63 pany, shall be vacated, set aside and annulled and shall not be regarded as of any force or effect against said defendant The Missouri Pacific Railway Comp-ny except so far as holding the amended bill to be sufficient, but that said The Missouri Pacific Railway Company shall have the right and shall be permitted to file an answer in said suit, to which said complainants The United States of America shall in due course file a replication thereto, and the issues shall be duly joined and the cause proceed to hearing and determination upon its merits in due course, the intention of this agreement being that the proceedings had upon the demurrer to said amended bill of complaint and the proposed appeal of said suit to a higher court shall in no manner prejudice the right of said defendant to a trial of said suit upon its merits.

Dated this 16 day of July, 1897.

W. C. PERRY,
MORRIS CLIGGITT,
Solicitors for Complainants.

Indorsed: No. 390. The U. S. A. *vs.* Mo. Pac. R'y Co. Stipulation. Filed Jul- 19, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

In the Circuit Court of the United States for the District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } No. 390.

Affidavit.

UNITED STATES OF AMERICA, *District of Kansas,* } *ss:*

W. C. Perry, of lawful age, being duly sworn, deposes as follows: I am United States attorney for the district of Kansas and solicitor

for the complainant. In support of the application for leave to file an amended bill of complaint in this suit, I testify that due notice has been given of said application to the defendant and the consent of the defendant obtained to the filing of an amended bill of complaint. The application for leave to file an amended bill of complaint is not made for the purpose of vexation or delay, and the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill.

W. C. PERRY.

Subscribed and sworn to before me this 18 day of July, 1897.
[SEAL.] GEO. F. SHARITT, *Clerk*,
By S. P. MOSHER, *Dep. Cl'k.*

64 Indorsed: 390. Affd. of W. C. Perry. Filed Jul- 19, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

UNITED STATES, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Order.

On the application of the complainant, the defendant consenting, said complainant is given permission to file its amended bill of complaint, and on the application of the defendant with consent of the complainant, said defendant is given leave to file a demurrer to said amended bill of complaint.

JNO. A. WILLIAMS, *Judge.*

Indorsed: No. 390. U. S. *vs.* Mo. Pac. R'y Co. Order permitting filing of amended bill and demurrer thereto. Filed Jul- 19, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainants,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.

Amended Bill of Complaint.

Come now the United States of America by W. C. Perry, United States attorney for the district of Kansas, and by leave of court first had and obtained, bring this their amended bill of complaint against The Missouri Pacific Railway Company, the defendant herein, and thereupon your orators complain and say:

That this suit is brought by the authority of and under the direction of the Attorney General of the United States, which said authority and direction is given under and in pursuance of a request of the Interstate Commerce Commission of the United States that the United States attorney for the district of Kansas be authorized

and directed to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the interstate commerce law against the defendant in relation to the matters herein complained of.

And your orators further aver and show unto your honors that The Missouri Pacific Railway Company, defendant herein, is a corporation organized and existing under and by virtue of the
65 laws of the States of Missouri and Kansas, and that said defendant was at all times herein mentioned and now is a common carrier of all classes and kinds of freight and commodities which are commonly carried, moved and transported by railroad companies and common carriers, in the freight traffic of such companies or carriers, between the city of St. Louis, in the State of Missouri, and the city of Omaha in the State of Nebraska, and between the city of St. Louis in said State of Missouri and the city of Wichita in the State of Kansas, and between all points intermediate and beyond said cities on the line of defendant's railroad, and which said railroad and said points of shipment are situated in various States of the United States, and in said shipments of freight said defendant is subject to the terms and provisions of the act of Congress entitled "An act to regulate commerce," approved February 4th, 1887, and to the amendments thereto.

And your orators further aver and show unto your honors that all shipments of freight between the city of St. Louis and the city of Wichita, and all shipments of freight between the city of St. Louis and the city of Omaha by said defendant company pass over the same track between the city of St. Louis and the city of Holden, in the State of Missouri, a distance of two hundred thirty-two (232) miles; that from said city of Holden said defendant has two lines of railroad, one of which from said city runs in a northwesterly direction to the city of Omaha, in the State of Nebraska, a distance over said defendant's railroad of five hundred one (501) miles from the city of St. Louis; and one branch of said railroad, from the said city of Holden runs in a westerly or southwesterly direction to the city of Wichita in the State of Kansas, a distance over defendant's railroad from said city of St. Louis of four hundred fifty-eight (458) miles. That said defendant owns, controls, manages and operates each and both of said lines of railroad in connection with many other lines of railroad owned, controlled and managed and operated by it and forming the Missouri Pacific system, and extending into and through different States of the United States, and that said defendant is constantly engaged as a common carrier of freight and passengers in the interstate commerce between the several States of the United States, and especially between the said city of St. Louis in the State of Missouri, and the city of Omaha, in the State of Nebraska, and the city of Wichita in the State of Kansas.

Your orators further aver and show unto your honors that the freight traffic between the city of St. Louis and the city of Wichita over said defendant's railroad is very extensive in volume
66 amounting to many thousands of dollars per annum, that said city of St. Louis is a general distributing point situated

on the Mississippi river and furnishes a market for large amounts of live stock and for freight of all classifications, and that the city of Wichita is a general distributing point for central and southern Kansas and the Indian Territory and Oklahoma, and furnishes an extensive market for freight of all classifications, and has extensive stock yards, and is largely engaged in the shipment of live stock, and but for the acts herein complained of would carry on a greatly increased and much larger and more profitable trade in the market furnished by St. Louis for live stock and for all classifications of freight.

And your orators further aver that said defendant's line of railroad, between the said cities of St. Louis and Wichita, with its western and southern connections with other lines of railroad at the said city of Wichita, constitutes one of the principal thoroughfares for the freight traffic between the Mississippi river and the Pacific ocean, and between the Mississippi river and the gulf of Mexico, at the city of Galveston.

And your orators further aver and show unto your honors that said defendant has established and for a long time has maintained and still maintains in force on the line of its railroad between the city of St. Louis and the city of Wichita rates, rules and regulations governing all freight traffic between said cities over the said railroad which are unjust and unreasonable in this, that said charges for services rendered by said company in the transportation of property and freight of each and every classification between the said city of St. Louis and the city of Wichita is excessive, exorbitant, unreasonable and unjust to the extent and amount that such rates and charges exceed the rates and charges on the line of said defendant's railroad between the cities of St. Louis and Omaha, all of which is to the great detriment and hindrance of commerce and trade between the said cities of St. Louis and Wichita, and between the localities to which said cities contribute as a supply point, and to the irreparable injury of the public and to the people of the United States.

And your orators further aver and show unto your honors that said defendant has established and for a long time prior hereto has maintained in force, and still maintains in force upon its said railroad a tariff and schedule of freight rates, rules and regulations governing all freight traffic passing between the city of Omaha and the city of St. Louis, and on all freight traffic passing
67 between the city of Wichita and the city of St. Louis, by means of which said defendant charges, demands, collects and receives a greater compensation for the transportation of property and freight of each and every classification over its railroad between the city of Wichita and the city of St. Louis than it does for the transportation of property and freight of the same kind and like classification between the city of St. Louis and the city of Omaha, notwithstanding the fact that said shipments are made at the same time and contemporaneously, and under similar circumstances and conditions; and that the city of Omaha is a greater distance from the city of St. Louis than the city of Wichita.

And your orators further aver that the tariff rates, rules and regulations in force on its railroad, and the charges demanded and received for shipments of freight by defendant upon its railroad between the cities of Wichita and St. Louis are an unjust and unreasonable discrimination against said city of Wichita, and in favor of said city of Omaha, and against persons shipping freight and property between said city of Wichita and said city of St. Louis, and in favor of persons shipping freight between said city of Omaha and said city of St. Louis, and subject the locality in, about and tributary to Wichita and the persons living therein to an undue and unreasonable prejudice and disadvantage by reason of the fact that the charges made in pursuance of said tariff freight rates, rules and regulations are largely in excess of the charges made by said defendant for like and contemporaneous service for the transportation of property between the cities of Omaha and St. Louis, and under substantially similar circumstances and conditions, and that said rates, rules, regulations and charges collected and received by said defendant for the shipments of freight between the cities of Wichita and St. Louis are unreasonable, excessive, exorbitant and unjust.

And your orators further aver and show unto your honors that the tariff and schedule rates and freight charges for the shipment of cattle on foot between the city of Omaha and the city of St. Louis over defendant's line of railroad are 17½ cents per hundredweight; that the tariff and schedule rates and freight charges for the shipment of hogs on foot from the city of Omaha to the city of St. Louis over defendant's railroad are 20 cents per hundredweight; that the tariff and schedule rates and charges for the shipments of cattle on foot between the city of Wichita and the city of St. Louis over defendant's line of railroad are twenty-eight and three-fourths cents per hundredweight; and that the tariff and schedule rates and freight charges for shipments of hogs on foot between the city of Wichita and the city of St. Louis over defendant's line of railroad are thirty-five cents per hundredweight.

68 That the tariff and schedule rate and charge for the shipment of the various classifications of freight between the city of Omaha and the city of St. Louis over defendant's railroad is as follows, to wit:

First-class freight 55 cents per cwt.
Second-class freight 40 cents per cwt.
Third-class freight 32 cents per cwt.
Fourth-class freight 25 cents per cwt.
Fifth-class freight 20 cents per cwt.
Class A 22½ cents per cwt.
Class B 17½ cents per cwt.
Class C 15 cents per cwt.
Class D 12½ cents per cwt.
Class E 11 cents per cwt.

That the tariff and schedule rate and charge for shipment of the various classifications of freight between the city of Wichita and the city of St. Louis over defendant's line of railroad is as follows, to wit:

First-class freight 115 cents per cwt.
Second-class freight 93 cents per cwt.
Third-class freight 78 cents per cwt.
Fourth-class freight 62½ cents per cwt.
Fifth-class freight 53 cents per cwt.
Class A 52 cents per cwt.
Class B 39½ cents per cwt.
Class C 33 cents per cwt.
Class D 27 cents per cwt.
Class E 11 cents per cwt.

That said tariff and schedule rates and charges above set forth constitute an unjust and unreasonable discrimination against persons shipping freight between the city of Wichita and the city of St. Louis and subject such persons and localities from which they ship to an unjust and unreasonable prejudice and disadvantage to the great hindrance and detriment of trade and commerce between St. Louis and the city of Wichita, and the localities tributary thereto, and to the irreparable injury to the persons shipping from said points and to the people of the United States.

And your orators further aver and show unto your honors that any schedule rates and freight charges for the various shipments and classifications hereinbefore set forth between the said cities of St. Louis and Wichita that are in excess of the tariff schedules and freight charges for shipments of the like kind and class of property between the cities of St. Louis and Omaha are unreasonable,
69 excessive, exorbitant and unjust in and of themselves, and constitute an unreasonable discrimination against Wichita and the localities tributary thereto and the people living therein and against persons shipping freight between the cities of Wichita and St. Louis and subject such persons and localities to an unjust and unreasonable prejudice and disadvantage.

In consideration whereof, and inasmuch as the wrongs herein complained of are remediless in the premises under the ordinary forms and proceedings at law and are relievable only in a court of equity and in this form of procedure, you- orators pray that the defendant, The Missouri Pacific Railway Company, its officers agents and employés, may provisionally and perpetually be enjoined and restrained by order of injunction issued herein from further establishing and maintaining in force upon its road freight rates, rules and regulations and charges governing the freight traffic between the city of Wichita and the city of St. Louis, by means whereof said defendant, its officers, agents and employés are required to and do collect a greater compensation for the shipment of live stock and for the shipment of the various classifications of freight mentioned in the foregoing amended bill of complaint between the city of Wichita and the city of St. Louis than it at the same time charges and receives for shipments of live stock or freight of the same classification as set forth in the above and foregoing amended bill of complaint between the cities of Omaha and St. Louis, and that said defendant, its officers, agents and employés be restrained and enjoined from continuing to charge unreasonable, exorbitant and unjust freights and tariffs

for the shipment of property and freight over its line between the cities of Wichita and St. Louis, and that it be enjoined and restrained from continuing or putting in force upon its line of railroad a greater rate of freight charge for transportation of freight of like classification between the city of Wichita and the city of St. Louis than it puts in force and maintains between the city of St. Louis and the city of Omaha.

To the end therefore that said defendant may, if it can, show why your orators should not have the relief hereby prayed, and may according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to each and all of the matters and things in this amended bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph and it was specially interrogated thereunto, may it please your honors to grant unto your orators a writ of *subpœna ad respondendum* issuing out of and under the seal of this honorable court, to be directed to said defend-
70 ant, The Missouri Pacific Railway Company, commanding it on a certain day and under certain penalty to be there inserted to appear before your honors in this honorable court, and then and there full, true, direct and perfect answer make to all and singular the said premises (answer under oath being hereby expressly waived), and further to stand to, perform and abide by such further order or decree as to your honors shall seem just and meet.

And also may it please your honors to grant unto your orators a writ of provisional and a writ of perpetual injunction to the same tenor, purport and effect as hereinbefore set forth and prayed, and also that in the meantime said defendant may be temporarily restrained and enjoined by an order of injunction or rule issuing out of and under the seal of this honorable court from doing any of the things against which an injunction is hereby prayed; and that your orators may have such other and further relief in the premises as the nature of the case may require and to your honors shall seem meet.

And your orators will ever pray, etc.

THE UNITED STATES OF AMERICA,
By W. C. PERRY,
United States Attorney for the District of Kansas and Solicitor for Complainants.

MORRIS CLIGGITT, *Of Counsel.*

UNITED STATES OF AMERICA, } ss:
District of Kansas, }

W. C. Perry being first duly sworn on oath says that he is the United States attorney for the district of Kansas, that he has read the foregoing amended bill of complaint and knows the contents thereof, and that the averments and allegations therein contained are true as he verily believes.

W. C. PERRY.

Subscribed and sworn to before me this — day of May, 1897.

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Indorsed: 390. The United States of America compl'ts *vs.* The Missouri Pacific Railway Company, defendant. Amended bill of complaint. Filed July 19, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

71 In the Circuit Court of the United States, District of Kansas, Second Division.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } No. 390.

The demurrer of the above-named defendant, The Missouri Pacific Railway Company, to the amended bill of complaint of the above-named complainants.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said amended bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said amended bill, and for causes of demurrer showeth:

I. That it appeareth by the complainants' own showing by the said amended bill, that they are not entitled to the relief prayed by the amended bill against this defendant.

II. That the said amended bill is exhibited against this defendant for several and distinct and independent matters and causes which have no relation to each other, and in which, or in the greater part of which this defendant is in no way interested or concerned, and ought not to be implicated.

III. That this defendant is not answerable to said complainants, but to some other persons, whose names it cannot state.

IV. That the said amended bill does not embrace the whole matter concerning which the suit is brought; wherefore this defendant may be harassed with other suits and a multiplicity of suits may ensue.

V. That it appears by the said amended bill that there are divers other persons who are necessary parties to the said bill but who are not made parties thereto.

VI. That it appears by the said amended bill that the case of the said complainants is barred by the statute of limitations.

Wherefore, and for divers other good causes of demurrer appearing on the said amended bill, this defendant doth demur thereto. And it prays the judgment of this honorable court whether it shall be compelled to make any answer to the said amended bill; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

J. H. RICHARDS,
C. E. BENTON,
RALPH RICHARDS,
B. P. WAGGENER,
Solicitors for Defendant, The Missouri Pacific Railway Company.

72 I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

J. H. RICHARDS,
Solicitor for Defendant, The Missouri Pacific Railway Company.

STATE OF KANSAS, *County of Bourbon,* } ss:

J. H. Richards, being duly sworn, deposes and says: I am one of the solicitors of the above-named defendant. The foregoing demurrer is not interposed for delay.

J. H. RICHARDS.

Subscribed and sworn to before me this 5th day of July, A. D. 1897.

My commission expires Aug. 6, 1899.

[SEAL.]

GEO. O. BACON,
Notary Public, Bourbon County, Kansas.

Indorsed: 390. The United States of America, complainant, vs. The Missouri Pacific Railway Company. Demurrer of defendant to amended bill of complaint. Filed Jul- 19, 1897. Geo. F. Shariff, clerk. By J. F. Shearman, D. C.

UNITED STATES, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } No. 390.

Order.

This cause came on to be further heard at this term on the demurrer of the defendant to the amended bill of complaint, and was argued by counsel, and thereupon on consideration thereof it is ordered, adjudged and decreed that said demurrer be and the same hereby is overruled, to which the defendant excepted and excepts, and which exception is allowed by the court. And thereupon the defendant electing to stand on its demurrer, it is hereby ordered, adjudged and decreed that the Missouri Pacific Railway Company, its officers, agents and employees be, and they hereby are, perpetually enjoined and restrained from further establishing and maintaining in force upon its road freight rates, rules and regulations and charges governing the freight traffic between the city of Wichita and the city of St. Louis, by means whereof said defendant, its officers, agents, and employees, are required to and do collect a greater compensation for the shipment of live stock, and for the shipment of any of the various classifications of freight mentioned in the amended bill of complaint, between the city of Wichita and the city of St. Louis, than it at the same time charges and receives for shipments of live stock and for freight of the same classification as set forth in said
73 amended bill of complaint between the city of Omaha and the city of St. Louis, when any of said shipments are made under substantially similar circumstances and conditions.

And said defendant, its officers, agents and employees, hereby are perpetually restrained and enjoined from continuing to charge unreasonable, exorbitant and unjust rates and tariffs for the shipment of property and freight over its line between the city of Wichita and the city of St. Louis, and from continuing or putting in force upon said line of railway greater rates of freight charges for the transportation of freight of like classification between the city of Wichita and the city of St. Louis than it puts in force and maintains between the city of St. Louis and the city of Omaha, when said transportation is conducted under substantially similar conditions and circumstances.

It is also ordered adjudged and decreed that the complainant have and recover from the defendant its costs in this behalf expended. And to the rendition of this decreee and the injunctions therein contained, the defendant at the time excepted, which exception was and is allowed.

JNO. A. WILLIAMS, *Judge.*

Indorsed: No. 390. The United States of America *vs.* The Missouri Pacific Railway Co. Order. Filed Jul- 19, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainants, *vs.* THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } In Equity. No. 390.

Assignment of Errors.

Now on this 23d day of December A. D. 1897, comes The Missouri Pacific Railway Company, defendant in the above-entitled action, by B. P. Waggener, J. H. Richards and C. E. Benton, its solicitors, and says that the order and decree made and entered in the above-entitled action in the above-named court on the 19th day of July, 1897, are erroneous and against the just rights of said defendant for the following reasons, to wit:

First. The court erred in overruling the demurrer to the amended bill of complaint and in entering the said decree, because it appears by said amended bill of complaint that the complainants are not entitled to the relief prayed for therein or to any relief.

74 Second. The court erred in entertaining said suit and in rendering said order and decree, because the complainants, The United States of America, are not the parties in interest and have no right, power or authority to prosecute said suit.

Third. The court erred in entertaining this suit and in rendering said order and decree, because the said complainants are not the parties in interest, there being no property rights of said complainants involved in this suit.

Fourth. The court erred in entertaining this suit and in rendering said order and decree, because the complainants, The United States of America, have no right, power or authority under the act to regulate interstate commerce on which the said amended bill of complaint is founded, to prosecute this action, before the powers of the Interstate Commerce Commission under said act have been exercised and exhausted.

Fifth. The court erred in entertaining this suit and in rendering the said order and decree, because if any person or persons sustained damage by the act or acts of this defendant in fixing and collecting rates between the city of Wichita and the city of Saint Louis such person or persons have adequate remedies under the provisions of section- eight, nine, ten and sixteen of the said act to regulate commerce.

Sixth. The court erred in entertaining this suit and rendering said order and decree because by the provisions of the act to regulate interstate commerce the Interstate Commerce Commission had and has exclusive primary jurisdiction to investigate and determine the matters charged in said amended bill of complaint, and at no time was any complaint made to or filed with said commission, or any proceedings or hearing had before said commission, relating to the matters set forth in said amended bill of complaint, nor did said commission ever make any order with reference to the same.

Seventh. The court erred in rendering said decree against this defendant in so far as the said decree prohibits this defendant, its officers, agents (*agents*) and employés, from charging and collecting greater compensation for the shipment of live stock and for the shipment of the various classifications of freight mentioned in said amended bill of complaint between the city of Wichita and the city of St. Louis than (—) at the same time charges and receives for the shipment of live stock and for said freight between the city of Omaha and the city of Saint Louis, because the court has no power to prescribe what rate shall be charged in the future between the city of Wichita and the city of Saint Louis.

75 Eighth. The court erred in rendering said decree in so far as this defendant, its officers, agents and employés, are perpetually restrained and enjoined from continuing to charge unreasonable, exorbitant and unjust rates and tariffs for the shipment of property and freight over its lines between the city of Wichita and the city of Saint Louis, because the court assumed, without proof or sufficient allegation, that this defendant had been charging unjust and exorbitant rates between said points, and assumed that all rates and charges on freight of the classifications mentioned in said amended bill of complaint were exorbitant and unreasonable to the extent and amount that such rates and charges exceeded the rate and charges on defendant's line of railroad on said freight, between the city of Omaha and the city of Saint Louis.

Ninth. The court erred in rendering said decree in this, in assuming, without proof or sufficient allegation in said amended bill of complaint, that the transportation of live stock and of the various

classifications of freight mentioned in said bill were or could be made over defendant's line of railroad between the city of Wichita and the city of Saint Louis under substantially similar circumstances and conditions as govern the transportation of like shipments between the city of Omaha and the city of Saint Louis.

Tenth. The court erred in rendering said decree against this defendant, for the reason that the amended bill of complaint is insufficient in failing to show that there is such actual and real competition or competitive interests between the cities of Wichita and Omaha and the city of Saint Louis, as to necessarily render any alleged discriminations or preference or prejudice unjust, (*indue*) and unlawful, within the purview and provisions of the interstate-commerce act.

Wherefore said defendant prays that the said order and decree of said court may be reversed and set aside and that this defendant be restored to all rights which its has lost by reason of the rendition of the same, and that said circuit court of the United States for the second division of the district of Kansas be directed to enter a decree sustaining defendant's demurrer to the said amended bill of complaint, and for such other and further relief as to the court may seem just.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By B. P. WAGGENER,
J. H. RICHARDS,
C. E. BENTON, *Its Solicitors.*

Indorsed: 390. Assignment of errors. Filed Dec. 23, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

76 In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainants,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.
} No. 390. In Equity.

Know all men by these presents, that we, The Missouri Pacific Railway Company as principal, and C. F. Drake and Chas. Nelson as sureties, are held and firmly bound unto the above-named United States of America in the sum of five hundred dollars to be paid to the said United States of America, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 23rd day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, the above-named The Missouri Pacific Railway Company has prosecuted an appeal to the United States circuit court of

appeals for the eighth circuit to reverse a decree rendered in the above-entitled suit in the circuit court of the United States for the second division of the judicial district of Kansas;

Now therefore, the condition of this obligation is such that if the above-named The Missouri Pacific Railway Company shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE MISSOURI PACIFIC RAILWAY COMPANY, [SEAL.]
By C. E. BENTON, *Its Solicitor.*
C. F. DRAKE. [SEAL.]
CHAS. F. NELSON. [SEAL.]

Sealed and delivered in the presence of
GEO. A. BACON.

Approved this 23d day of December 1897.
CASSIUS G. FOSTER, *Judge.*

Indorsed: 390. Bond. Filed Dec. 23, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

77 In the Circuit Court of the United States for the Second Division of the District of Kansas.

THE UNITED STATES OF AMERICA, Complainant,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant.
} No. 390. In Equity.

Petition on Appeal.

The above-named defendant conceiving itself aggrieved by the order and decree made and entered on the 19th day of July 1897 in the above-entitled cause does hereby appeal from said order and decree to the United States circuit court of appeals for the eighth circuit, for the reasons specified in the assignment of errors which is filed herewith, and defendant prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the United States circuit court of appeals for the eighth circuit.

B. P. WAGGENER,
J. H. RICHARDS,
C. E. BENTON,
Solicitors for Defendant.

December 22d, 1897.

Now to wit, on this 23rd day of December, 1897, it is ordered that the appeal be allowed as prayed for.

CASSIUS G. FOSTER, *Judge.*

Indorsed: 390. Petition for and order allowing appeal. Filed Dec. 23, 1897. Geo. F. Sharitt, clerk. By J. F. Shearman, D. C.

UNITED STATES OF AMERICA, } ss:
District of Kansas, Second Division, }

I, Geo. F. Sharitt, clerk of the circuit court of the United States of America, for the district of Kansas, do hereby certify the above and foregoing to be true, full and correct copies of the several files and records in the case therein entitled, as the same appear on file or of record in my office in said division.

Seal of the Circuit Court of the United States, 2d Div., District of Kansas.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Wichita, in said district this 4th day of January, A. D. 1898.

GEO. F. SHARITT, *Clerk*,
By J. F. SHEARMAN,
Deputy Clerk.

Filed Jan. 12, 1898.

JOHN D. JORDAN, *Clerk.*

78 (*Appearance for Appellant.*)

And on the twelfth day of January, A. D. 1898, an appearance of counsel for the appellant was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant, }
vs. } No. 1040.
THE UNITED STATES OF AMERICA. }

The clerk will enter my appearance as counsel for the appellant.

ALEX. G. COCHRAN.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. December term, 1897. No. 1040. Missouri Pacific R'y Co., appellant, *vs.* The United States. Appearance. Filed Jan. 12, 1898. John D. Jordan, clerk. Alex. G. Cochran, counsel for appellant.

(*Appearance for Appellant.*)

And on the fourteenth day of October, A. D. 1899, an appearance of counsel for the appellant was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1899.

MISSOURI PACIFIC RAILWAY COMPANY, Appellant,
vs.
UNITED STATES OF AMERICA. } No. 1040.

The clerk will enter our appearance as counsel for the appellant.

C. E. BENTON.
RALPH RICHARDS.
J. H. RICHARDS.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. May term, 1899. No. 1040. Missouri Pacific Railway Company, appellant, *vs.* United States of America. Appearance. Filed Oct. 14, 1899. John D. Jordan, clerk. C. E. Benton, Ralph Richards and J. H. Richards, Fort Scott, Kan., counsel for appellant.

79

(*Appearance for Appellee.*)

And on the eighth day of March, A. D. 1898, an appearance of counsel for the appellee was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1897.

MISSOURI PACIFIC RAILWAY CO., Appellant,
vs.
UNITED STATES OF AMERICA. } No. 1040.

The clerk will enter my appearance as counsel for the appellee.

I. E. LAMBERT,
U. S. Attorney.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. December term, 1897. No. 1040. Missouri Pacific Railway Co., appellant, *vs.* United States. Appearance. Filed Mar. 8, 1898. John D. Jordan, clerk. I. E. Lambert, counsel for appellee.

(*Appearance for Appellee.*)

And on the fourteenth day of March, A. D. 1899, an appearance of counsel for the appellee was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1898.

MISSOURI PACIFIC RAILWAY COMPANY, Appellant,
vs.
UNITED STATES. } No. 1040.

The clerk will enter my appearance as counsel for the appellee.
W. C. PERRY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit.
80 December term, 1898. No. 1040. Missouri Pacific Railway Company, appellant, *vs.* United States. Appearance. Filed Mar. 14, 1899. John D. Jordan, clerk. W. C. Perry, counsel for appellee.

(*Order of Submission.*)

And on the twenty-third day of May, A. D. 1900, in the record of the proceedings of said United States circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

WEDNESDAY, *May* 23, 1900.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant,
vs.
THE UNITED STATES OF AMERICA. } No. 1040.

Appeal from the circuit court of the United States for the district of Kansas.

This cause having been called for hearing in its regular order, was argued by Mr. J. H. Richards for appellant and submitted by appellee without oral argument.

Thereupon, this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

(*Decree.*)

And on the twenty-third day of May, A. D. 1900, in the record of the proceedings of said United States circuit court of appeals is a decree in said cause, in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1900.

WEDNESDAY, *May* 23, 1900.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant,
vs.
THE UNITED STATES OF AMERICA. } No. 1040.

Appeal from the circuit court of the United States for the district of Kansas.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kansas, and was argued by counsel.

81 On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause, be, and the same is hereby, affirmed without costs to either party in this court and without an opinion.

May 23, 1900.

(*Assignment of Errors.*)

And on the fourteenth day of May, A. D. 1901, an assignment of errors was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, Complainants,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } In Equity.

Assignment of Errors.

Now on this 10th day of May, 1901, comes The Missouri Pacific Railway Company, defendant in the above-entitled action by J. H. Richards and C. E. Benton, its solicitors, and says that the order and decree made and entered in the above-entitled action in the above-named court on the 23rd day of May, 1900, are erroneous and against the just rights of said defendant for the following reasons, to wit:

First. The court erred in overruling the demurrer to the amended bill of complaint and in entering said decree, because it appears by said amended bill of complaint that the court had no jurisdiction to entertain said suit, said bill is without equity, and shows upon its face that the complainants are not entitled to the relief prayed for therein, or to any relief.

Second. The court erred in entertaining this suit and in rendering said order and decree because the complainants, The United States of America, are not the real parties in interest and have no lawful right, power or authority to prosecute said suit, and no property rights of said complainants are involved in said suit.

82 Third. The court erred in entertaining this suit and in rendering said order and decree because the complainants, The United States of America, have no right, power or authority under the Constitution and laws of the United States and the act to regulate interstate commerce on which said amended bill of complaint is alleged to be founded, to prosecute this suit before a hearing of the matters in dispute between the complainants and the defendant has been had by the Interstate Commerce Commission and said Interstate Commerce Commission has acted upon the same as provided by law.

Fourth. The court erred in entertaining this suit and in rendering said order and decree, because if any person or persons, locality or municipality sustained damage by the act or acts of this defendant in fixing and collecting rates between the city of Wichita and the city of St. Louis, or between the city of Omaha and the city of St. Louis, such person or persons, locality or municipality have adequate remedies, and in cases of injunctions exclusive remedy, under the provisions of said act to regulate interstate commerce.

Fifth. The court erred in entertaining this suit and rendering said order and decree because by the provisions of the act to regulate interstate commerce the Interstate Commerce Commission had and has exclusive primary jurisdiction to investigate and determine the matters charged in said amended bill of complaint, and at no time was any complaint made to or filed with said commission, or any proceedings or hearing had before said commission, relating to the matters set forth in said amended bill of complaint, nor did said commission ever make any order with reference to the same.

Sixth. The court erred in rendering said decree against this defendant in so far as the said decree prohibits this defendant, its officers, agents and employees, from charging and collecting greater compensation for the shipment of live stock and of the various classifications of freight mentioned in said amended bill between the city of Wichita and the city of St. Louis, than it at the same time charges and receives for the shipment of live stock and of freight between the city of Omaha and the city of St. Louis,
83 because neither the Interstate Commerce Commission nor the court had power or right to prescribe what rate should be charged in the future, or at all, between the city of Wichita and the city of St. Louis, and because the court in rendering said decree assumed, without proof or sufficient allegation that the defendant had been charging unjust and exorbitant rates between said points, and assumed that all rates and charges on freight of the classifications mentioned in said amended bill were exorbitant and unreasonable to the extent and amount that such rates and charges exceeded the rate and charges on defendant's line of railroad between the city of Omaha and the city of St. Louis.

Seventh. The court erred in rendering said decree against this defendant for the reason that the amended bill of complaint is insufficient in failing to show that there is such actual and real competition or competitive interests between the cities of Wichita and Omaha and the city of St. Louis as to render the alleged charges

discriminations, preferences or prejudices unjust and unlawful within the purview and provisions of the interstate-commerce act.

Eighth. The court erred in rendering said decree against this defendant for the reason that the amended bill of complaint does not state facts sufficient to constitute a cause of action or suit in favor of the complainants and against the defendant.

Wherefore defendant prays that the said order and decree of said court may be reversed and set aside and that this defendant be restored to all rights which it has lost by reason of the rendition of the same, and that said United States circuit court of appeals be directed to enter a decree sustaining defendant's demurrer to the said amended bill of complaint, and for such other and further relief as to the court may seem just.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By J. H. RICHARDS,
C. E. BENTON, *Its Solicitors.*

B. P. WAGGENER, *Of Counsel.*

84 (Endorsed:) No. 1040. U. S. circuit court of appeals, eighth circuit. Missouri Pacific R'y Co., appellant, *vs.* United States of America. Assignment of errors. Filed May 14, 1901. John D. Jordan, clerk.

(*Affidavit as to Amount in Controversy.*)

And on the fourteenth day of May, A. D. 1901, an affidavit as to amount in controversy was filed in the clerk's office of said circuit court of appeals, in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, Complainants,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } In Equity.

Affidavit.

UNITED STATES OF AMERICA,
State of Kansas, Bourbon County, } *ss:*

J. H. Richards being duly sworn on oath says that he is one of the solicitors for The Missouri Pacific Railway Company, defendant in the above-entitled action; that he has personal knowledge of the amount in controversy herein and which said amount is more than five thousand (5,000) dollars exclusive of costs.

J. H. RICHARDS.

Subscribed and sworn to before me this 11th day of May, 1901.

GEO. O. BACON,
[SEAL.] *Notary Public, Bourbon County, Kansas.*

My commission expires Aug. 6th, 1903.

(Endorsed:) No. 1040. U. S. circuit court of appeals, eighth circuit. Missouri Pacific R'y Co., appellant, *vs.* United States of America. Affidavit as to amount in controversy. Filed May 14, 1901. John D. Jordan, clerk.

85 (*Petition for and Order Allowing Appeal.*)

And on the fourteenth day of May, A. D. 1901, a petition for and order allowing an appeal was filed in the clerk's office of said circuit court of appeals in said cause, in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, Complainants,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } In Equity.

Petition on Appeal.

The above-named defendant, appellant, The Missouri Pacific Railway Company, conceiving itself aggrieved by the order and decree made and entered on the 23rd day of May, 1900, in the above cause, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree were made, duly authenticated, may be sent to the Supreme Court of the United States for review.

C. E. BENTON,
J. H. RICHARDS,
Solicitors for Defendant.

B. P. WAGGENER, *Of Counsel.*

May 13th, 1901.

Now, to wit: on this 14th day of May, 1901, it is ordered that the appeal be allowed as prayed for.

WALTER H. SANBORN,
U. S. Circuit Judge in and for the Eighth Circuit.

(Endorsed:) No. 1040. U. S. circuit court of appeals, eighth circuit. Missouri Pacific R'y Co., appellant, *vs.* United States of America. Petition for and order allowing an appeal. Filed May 14, 1901. John D. Jordan, clerk.

86 (*Appeal Bond.*)

And on the fourteenth day of May, A. D. 1901, an appeal bond was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

THE UNITED STATES OF AMERICA, Complainants,
v.
THE MISSOURI PACIFIC RAILWAY COMPANY, Defendant. } In Equity.

Bond.

Know all men by these presents, that we, The Missouri Pacific Railway Company as principal, and Chas. Nelson & C. F. Drake as sureties, are held and firmly bound unto the above-named United States of America in the sum of five thousand dollars *dollars* to be paid to the said United States of America, for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 10th day of May, in the year of our Lord one thousand nine hundred and one.

Whereas, the above-named The Missouri Pacific Railway Company has prosecuted an appeal to the Supreme Court of the United States to reverse a decree rendered in the above-entitled suit in the United States circuit court of appeals, eighth circuit;

Now therefore, the condition of this obligation is such that if the above-named The Missouri Pacific Railway Company shall prosecute said appeal to effect and answer all damages and costs if it fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE MISSOURI PACIFIC RAILWAY COMPANY, [SEAL.]
By J. H. RICHARDS, *Its Solicitor.*
CHAS. NELSON. [SEAL.]
C. F. DRAKE. [SEAL.]

Sealed and delivered in the presence of:
J. H. RICHARDS.

87 (Endorsed:) No. 1040. U. S. circuit court of appeals, eighth circuit. Missouri Pacific R'y Co., appellant, *vs.* United States of America. Appeal bond. The within bond and the security furnished thereby are approved this May 14, 1901. Walter H. Sanborn, U. S. circuit judge. Filed May 14, 1901. John D. Jordan, clerk.

(*Citation.*)

And on the fourteenth day of May, A. D. 1901, a citation was filed in the clerk's office of said United States circuit court of appeals, in said cause, the original of which is hereto attached and herewith returned.

88 *Citation.*

In the Supreme Court of the United States.

The United States of America to the United States of America:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty (30) days from and after the day this citation bears date, pursuant to an appeal filed in the clerk's office of the United States court of appeals, eighth circuit, wherein The Missouri Pacific Railway Company is appellant and The United States of America is appellee, to show cause, if any there be, why the order and decree rendered against the said appellant in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Walter H. Sanborn, U. S. circuit judge, this 14th day of May, in the year of our Lord one thousand nine hundred and one.

WALTER H. SANBORN,
United States Circuit Judge in and for the Eighth Circuit.

89 [Endorsed:] No. —. Supreme Court of the United States. October term, 190–. The Missouri Pacific Railway Company, appellant *vs.* The United States of America. Citation. Filed May 14 1901 John D. Jordan, clerk. Citation.

In the Supreme Court of the United States.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant,
vs.
THE UNITED STATES OF AMERICA, Appellee. } In Equity.

Waiver of Issuance and Service of Citation and Entry of Appearance.

We hereby, this 10th day of May, 1901, waive the issuance and service of *service of* citation in the above-entitled cause on behalf of The United States of America, appellee, and agree to enter the appearance of the United States of America in the said cause in the Supreme Court of the United States.

I. E. LAMBERT,
United States Attorney for the District of Kansas.
W. C. PERRY,
Solicitor for Appellee.

[Endorsed:] No. 1040. Supreme Court of the United States. October term, 190–. Missouri Pacific Railway Company, appellant, *vs.* The United States of America. Waiver of issuance and service of citation and appearance for appellee. To be filed by clerk Supreme Court U. S.

90 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing ninety pages contain full, true and complete copies of all the pleadings, proceedings and record entries, in a certain cause wherein The Missouri Pacific Railway Company was appellant, and The United States of America was appellee, No. 1040, May term, 1900, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the mandate in said cause was issued to the circuit court of the United States for the district of Kansas on the twenty-third day of July, A. D. 1900.

I do further certify that the original citation is hereto attached and herewith returned.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, this sixteenth day of May, A. D. 1901.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: File No. 18,181. U. S. circuit court appeals, 8th circuit. Term No. 108. The Missouri Pacific Railway Company, appellant, *vs.* The United States. Filed May 25, 1901.

LE COPY.

Supreme Court U. S.
FILED
JAN 12 1903
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant,
vs.
THE UNITED STATES OF AMERICA,
Appellee.

No. 108.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLANT.

JOHN F. DILLON,
J. H. RICHARDS,
C. E. BENTON,
B. P. WAGGENER,
Attorneys for Appellant.

ALEXANDER G. COCHRAN,
Of Counsel.

C. G. Burgoyne, Walker and Centre Street, N. Y.

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I.

The Interstate Commerce Act is a complete code of laws and rules of procedure, both civil and criminal, governing interstate commerce and radically revolutionizes all prior procedure. Aside from private actions at law for damages by persons injured (Secs. 8, 9), the said Act creates new rights and remedies to which all right of redress is limited, and which the general, or common law, so called, did not give..... 12

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Said Section 12 does not attempt to change or enlarge the jurisdiction of the Circuit Courts in equity, or to authorize a bill in equity, such as the present bill, to determine the reasonableness of rates or discrimination in rates, either in the name of the United States or in that of the Commission, and the Circuit Court in equity has no jurisdiction, either generally or under the Interstate Commerce Act over the particular controversy presented by the bill---------- 40

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant, vs. THE UNITED STATES OF AMERICA, Appellee.	N. 108.

Brief and Argument for Appellant.

STATEMENT OF THE CASE.

This is a bill of complaint of the United States of America, by J. W. Ady, United States Attorney for the District of Kansas, against the defendant, under and by virtue of, as it is alleged, the Act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887 (24 St. at Large, p. 379, Vol. 1, Supp. Rev. Stat., p. 529), and the amendatory acts of March 2, 1889 and February 10, 1891 (25 St. at Large, p. 855; Vol. 1, Supp. Rev. Stat., p. 684; 26 St. at Large, p. 743, Vol. 1, Supp. Rev. Stat., p. 891).

It is alleged that:

"This suit is brought by the authority of and under the direction of the Attorney General of the United States, which said authority and direction is

given under and in pursuance of the request of the Interstate Commerce Commission of the United States that the United States Attorney for the District of Kansas be directed and authorized to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the Interstate Commerce Law against the defendant in relation to the matters herein complained of."

Rec., p. 55.

This allegation in the bill is material to be noticed because counsel in argument shift or enlarge their ground and claim that "*Equity is equal to every emergency*," and that the United States has a right to file such a bill as a general trustee (*parens patriæ*) for all the people independent of any request or action on the part of the Commission, and notwithstanding the provisions and purpose of the Act which are inconsistent with the existence of any such right on the part of the United States in a suit of such a character as the present suit.

This bill is filed for a violation of Section 3 of the Interstate Commerce Act on the ground that the defendant in its rates gives an undue preference or advantage to the City of Omaha, Nebraska, to the undue prejudice or disadvantage of the City of Wichita, Kansas. If this suit were entitled according to substance it would be *City of Wichita vs. City of Omaha.*

This is an independent bill in equity brought in the name of the United States in respect of such alleged discrimination without the matter of such discrimination having been examined and the facts found by the Interstate Commerce Commission; and the main question in the case is whether an original bill in equity will lie in the

first instance by and in the name of the United States where the Interstate Commerce Commission has not investigated or made any findings, and where the sole purpose of the bill is to establish the existence of alleged discriminatory railroad rates as between "*localities*," and to have such discrimination perpetually enjoined by the Circuit Court sitting in equity.

The matters of complaint in the amended bill (Record, pp. 55, 57, 59) are substantially and only that the defendant, being a common carrier between the cities of St. Louis and Wichita, and St. Louis and Omaha, has established, maintained and still (at the time suit was brought) maintains in force on the line of its road between the said cities of St. Louis and Wichita, rates, rules and regulations governing freight traffic between said cities which are unjust and discriminatory, in favor of Omaha and against Wichita, and that the charge for such service rendered by said company in the transportation of the property and freight of the various classifications between the City of St. Louis and the City of Wichita is excessive and exorbitant to the detriment and hindrance of commerce and trade between said localities, and to the irreparable injury of the public, and that it maintains upon its line a tariff of freight rates governing all freight traffic passing between the City of Wichita and the City of St. Louis, by means of which it charges, demands, collects and receives a greater compensation for the transportation thereof over its railroad between the City of Wichita and the City of St. Louis, than it does for the transportation of freight and property of the same kind and classification between the City of Omaha and the City of St. Louis, notwithstanding the same are made at the same time and contemporane-

ously under similar circumstances and conditions, resulting, as it is alleged, in an unjust and unreasonable discrimination against shippers between the City of Wichita and the City of St. Louis, and subjecting the City of Wichita to an undue and unreasonable prejudice and disadvantage by reason thereof.

The amended bill does not charge that the rates are unreasonable *per se;* but only that the rates are unreasonable "to the extent and amount that such rates and charges to Wichita exceed the rates and charges to Omaha" (Rec., pp. 57, 58). This is important to be kept in mind.

A suit of this character is novel. No precedent for it exists. This is, therefore, a question of first impression; and it is one of great importance in its principles and possible consequences.

The suit stands upon the *amended* bill of complaint and the demurrer (Record, 55–60). It was first heard on a demurrer to the original bill in the Circuit Court of the United States for the District of Kansas before the Honorable JOHN A. WILLIAMS, District Judge, sitting in said jurisdiction, and who, on December 17th, 1894, rendered his decision overruling said demurrer, which decision and opinion is reported in 65 Federal Reporter, page 903 (Rec., 12–20).

After the said decision of Judge WILLIAMS on the demurrer to the original bill, the defendant company filed answer denying the alleged discrimination generally and in detail (Record, pp. 18–27). Exceptions to the answer were made and an amended answer filed (Record, pp. 33–52). Replication was filed (Record, p. 52). After all this, the parties made the stipulation found on page 53, to the effect that "it is desirable and best that the

questions of law arising upon the bill of complaint as amended and a demurrer thereto be first finally adjudicated and put at rest by the Circuit Court of Appeals of the United States and the Supreme Court of the United States," which it was stipulated might be done without prejudice to the right of the defendant if it were held that the bill was maintainable to a trial of the suit upon its merits.

The amended bill was accordingly filed (Record, pp. 55–60); demurrer thereto was filed (p. 61), and a decree rendered in favor of the complainant.

Said decree is in the words and figures below (Record, p. 62):

DECREE.

"This cause came on to be further heard at this term on the demurrer of the defendant to the amended bill of complaint, and was argued by counsel, and thereupon on consideration thereof it is ordered, adjudged and decreed that said demurrer be and the same hereby is overruled, to which the defendant excepted and excepts, and which exception is allowed by the court. And thereupon the defendant electing to stand on its demurrer, it is hereby ordered, adjudged and decreed that the Missouri Pacific Railway Company, its officers, agents and employees be, and they hereby are, perpetually enjoined and restrained from further establishing and maintaining in force upon its road freight rates, rules and regulations and charges governing the freight traffic between the City of Wichita and the city of St. Louis, by means whereof said defendant, its officers, agents and employees, are required to and do collect a greater compensation for the shipment of live stock, and for the shipment of any of the various classifications of freight mentioned in the amended bill of complaint, between the city of Wichita and the city of St. Louis, than it at the same time charges and re-

ceives for shipments of live stock and for freight of the same classification as set forth in said amended bill of complaint between the city of Omaha and the city of St. Louis, when any of said shipments are made under substantially similar circumstances and conditions.

And said defendant, its officers, agents and employees, hereby are perpetually restrained and enjoined from continuing to charge unreasonable, exorbitant and unjust rates and tariffs for the shipment of property and freight over its line between the city of Wichita and the city of St. Louis, and from continuing and putting in force upon said line of railway greater rates of freight charges for the transportation of freight of like classification between the city of Wichita and the city of St. Louis than it puts in force and maintains between the city of St. Louis and the city of Omaha, when said transportation is conducted under substantially similar conditions and circumstances.

It is also ordered, adjudged and decreed that the complainant have and recover from the defendant its costs in this behalf expended. And to the rendition of this decree and the injunctions therein contained, the defendant at the time excepted, which exception was and is allowed."

From this decree an appeal was duly taken by the defendant to the United States Circuit Court of Appeals for the Eighth Circuit.

The decree of the Circuit Court was affirmed by the Circuit Court of Appeals without costs to either party and without an opinion (Rec., 70).

The defendant company appeals to this Court.

ARGUMENT FOR APPELLANT.

A careful examination of the amended bill of complaint, and of the decree of the Circuit Court, will show that the only substantial issue involved relates to discrimination between localities; and that the charge of discrimination is grounded upon the alleged fact that the rates and charges between the City of Wichita and the City of St. Louis are higher over defendant's line of railroad than between the City of Omaha and the City of St. Louis, wherefore they are unjust and unreasonable (Record, p. 57).

The decree was accordingly limited to forbidding the defendant to charge more to Wichita than to Omaha.

It is manifest from the pleadings, opinion and decree of the Court above referred to (and it will doubtless be conceded by opposing counsel), that the Interstate Commerce Commission had never investigated the complaint in question, or made any order to desist or other order against this defendant (Sec. 15), or gave it any opportunity to be heard upon any charge or complaint by or before said Commission, but without any preliminary proceedings whatever and in the first instance, made the request for the institution and prosecution of proceedings as alleged in the amended bill of complaint. No such preliminary or other proceedings before the Commission or findings of fact by the said Commission are alleged in the bill of complaint; and this is an original, independent suit by the United States in equity, and not a suit to enforce any order or decision of the Commission.

The position of defendant, broadly stated, is, that

the complainants, the United States of America, have stated in their amended bill no sufficient facts to constitute a cause of action in equity, in their behalf against this defendant; that the case comes under no recognized head of equity jurisdiction; that the Act to Regulate Commerce has conferred no general equity jurisdiction over the case, but on the contrary has withheld such jurisdiction; that as matter of law the United States of America have not, pursuant to the Act to Regulate Commerce, upon which this bill is alleged to be founded, a right to maintain such a bill against this defendant, and that the Circuit Court *in equity* has no jurisdiction of said cause, or of the said bill of complaint, and cannot, by virtue of said Act or otherwise draw unto itself original and independent jurisdiction in equity of the cause set out in the bill. The remedy in such a case is that prescribed in the Act, viz., an investigation by the Commission and a suit or action to enforce its findings and orders (Secs. 13–16). These sections provide a complete plan of procedure applicable to the present case and which is inconsistent with the right of the United States to bring this independent bill.

In any event there is an adequate remedy at law, to wit, by action of law, or by *mandamus* as prescribed in the said Act.

We deny the right of the United States to prosecute in its own name and in a court of equity by original bill, the pretended cause of action set out in the amended bill; and we call in question the right of the United States attorneys, either upon the request of the Interstate Commerce Commission of the United States, or independent thereof, to institute a suit of *this* character against this defendant, except in the mode and by the procedure specifically enacted by Congress em-

powering them and said Commission thereunto; and for the following reasons:

(1) Because Congress, in whom resided all power over interstate commerce, delegated, by the Interstate Commerce Act, its power under the Constitution to regulate and control interstate commerce to the Interstate Commerce Commission, which is by said Act clothed with the power to primarily investigate, and execute the Act.

(2) Because this power conferred upon the said Commission to primarily investigate and put into execution the Act is, *in suits of the character in question*, exclusive, and the courts cannot act upon such case or suit until such primary or preliminary investigation has been had.

(3) Because no remedy by injunction for the wrongs charged in this amended bill is given for any violation of the Act save as in Sections Nine and Sixteen of the Act provided, by and through the Commission and the Circuit Courts. The right is also given by Section Nine to sue at law "for mere recovery of damages claimed," in which case there is no relief by injunction, there being in such case an adequate remedy at law. No remedy by injunction is given for such violation of the Act except for "disobedience" of a lawful order first made to "desist" or make "reparation," as provided in Section Sixteen.

(4) Because the only subject of the suit contemplated by the Act is injury to property and civil rights of the parties designated in the Act, which includes all possible classes of persons, corporations, as-

sociations, companies, municipalities, etc., and by rule of construction excludes the Government, which has not, under the act or independent thereof, any national or special or property interests in such suit, and excludes the right of the United States to bring a bill in equity in its own name such as the present bill, and because the circuit court sitting in equity has no jurisdiction to enforce the alleged public duty of the defendant company or to make such a decree as the decree rendered in this cause. The cause stated in the amended bill is not cognizable in a court of equity, at least in the absence of a statute giving equity jurisdiction over such a controversy.

(5) Because the amended bill cannot be maintained against an existing schedule which is presumptively legal until the Commission charged by the act with knowledge of such schedule has notified the carrier of an alleged wrong under the act and to desist (Section 15), and the statutory time and opportunity is given defendant after notice to alter the schedule or rate in force thereunder.

(6) Because the schedule in force is *prima facie* the legal rate in force so long as such schedule is in force.

(7) Because the making of the schedule in the first instance, whether single or joint, is wholly confided by section six, and, as declared by the Courts, to the carrier, which is required to publish the same in manner and form as approved by the Commission. The mere *regulation* of such schedule is by the same section solely committed to the Commission, and the Courts have no right or power to regulate schedules in the first instance in an original suit, it being the duty and

the sole prerogative of (1) the carrier to make and publish the rate as required by the Commission under the act; and (2) the Commission to challenge upon notice and investigation such schedule or rates when made and put into force by the carrier, and (3) the Courts to enjoin the carrier if it refuses to desist.

(8) Because the amended bill of complaint fails to state a good and sufficient cause of action against defendant in this: that all of its allegations and averments are mere conclusions of fact and law and do not allege facts, circumstances and conditions showing that the charges made and collected on the St. Louis-Wichita route, though greater than the St. Louis-Omaha route, are unreasonably and unjustifiably so under all the manifestly varied conditions and circumstances surrounding the shipment, and under the provisions of the Interstate Commerce Act. The amended bill and decree wholly ignore every necessary consideration and element of dissimilarity of condition and of circumstance as recognized by the act itself, and by the Courts in construing the act, and should state the *facts* showing there is an *unreasonable* discrimination and unreasonable preference and rate.

(9) Because the bill fails to state facts showing that there is either such mutual relation of the people of Wichita and vicinity and the city of Omaha to one another and to the St. Louis market or the business over the respective lines of defendant described in the bill, or such unreasonable discrimination or undue preference, or discrimination or preference at all, as to constitute a cause of action. The mere exhibit in the bill of the schedules on the two lines, and the

mere comparison of rates between states, or municipalities, or communities in different states, together with the mere allegation of discrimination and undue preference, and consequent injuries charged, do not state facts constituting a cause for the injunction order and decree sought by the bill, under the Interstate Commerce Act and the decisions of the Courts interpreting it.

From the foregoing statement of our legal position we deduce the following propositions of law, which we will now discuss in their order:

I.

THE INTERSTATE COMMERCE ACT IS A COMPLETE CODE OF LAWS AND RULES OF PROCEDURE, BOTH CIVIL AND CRIMINAL, GOVERNING INTERSTATE COMMERCE AND RADICALLY REVOLUTIONIZES ALL PRIOR PROCEDURE. ASIDE FROM PRIVATE ACTIONS AT LAW FOR DAMAGES BY PERSONS INJURED (SECS. 8, 9), THE SAID ACT CREATES NEW RIGHTS AND REMEDIES TO WHICH ALL RIGHT OF REDRESS IS LIMITED, AND WHICH THE GENERAL, OR COMMON LAW, SO CALLED, DID NOT GIVE.

It is common knowledge and it is history that prior to the enactment of the Interstate Commerce Act Congress had not exercised its power of regulation of interstate commerce, and so it was said in

I. C. C. vs. B. & O. R. R. Co., 145 U. S., 263, 275, that the common law:

"Demanded little more than that carriers should carry for all persons who applied in the order in which the goods were delivered at the particular station, and

that their charges for transportation should be reasonable. It is familiar history that Congress, prior to such enactment, had left the regulation of commerce largely and almost wholly to state legislation, with no attempt whatever by any general or special enactment to control this class of traffic. The inefficiency of these laws beyond state lines, and impossibility of securing harmony of action, emphasized the necessity of legislation by Congress under its constitutional power to regulate commerce, which finally resulted in what is known as 'the Interstate Commerce Act.' "

" The principal objects of the Act were to secure just and reasonable charges for transportation; to prohibit unjust discrimination in the rendition of like services under similar circumstances and conditions; to prevent undue or unreasonable preference to persons, corporations or localities; in inhibiting greater compensation for a shorter than a longer haul, and to abolish combinations for pooling of freights."

It will be observed from the foregoing that this Court holds that the common law did not afford any of the remedies which this analysis of the Court sets forth as being afforded by this act, except the mere power of requiring common carriers "to carry for all persons who applied in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable."

In that same connection this Court says of the opinion prevailing at that date, that:

"It was even doubted whether they (the carriers) were bound to make the same charge to all persons for the same service."

The point to be noted in the present case is that discrimination between *localities* (which is the sole

gravamen of the present suit) is not unlawful at common law, and can only become unlawful by statute; and hence the present suit must rest alone upon the Interstate Commerce Act, and the only remedy is the special remedy prescribed by that Act (Secs. 13 to 16).

Mr. McNulta, in discussing this subject before the Illinois Bar Association, said this was the:

"First substantial exercise of the power so delegated to Congress by the constitution, and the beginning of a new era in the management of the railroads of the country, and the transportation of all commodities thereon; that the Supreme Court of the United States, in its earlier decisions, had intimated, if it did not directly decide, that the power of control lay in the states until the federal government should act, that in effect, there was a concurrent state and federal jurisdiction, and that the former was potent upon all questions until it appeared there was a conflict, when the act of the latter should prevail as law; that under this ruling the field for legislation was left open to the several state legislatures, without uniformity of action until the decision of the Supreme Court of the United States in *Wabash R. R. Co. vs. Illinois*, 118 U. S., 557; this decision modified the former ruling, and held in effect that the grant gave to Congress exclusive power, *and until exercised by Congress in the form of the passage of the Act, it lay dormant.*"

Also in the statement made by the Interstate Commerce Commission itself, recommending to Congress an amendment to the Interstate Commerce Act, it is said that:

"The Interstate Commerce Commission is an arm of Congress, an agency created by it to execute the power expressly conferred on Congress to 'regulate commerce.' It exercises the power conferred upon it

for that purpose, subject to the same statutory limitations, and none other, as would rest upon the direct exercise of those powers by Congress itself."

This view has been reiterated in repeated decisions of the Federal Courts since.

In the decision of the United States Supreme Court in what is known as the "*Express cases*," 117 U. S., 1, it was substantially held that it was no part of the common law obligation of railway companies to furnish the same facilities or instrumentalities to all alike; that railway companies were not required by usage or by common law to transport the traffic of independent express companies in the manner in which such traffic was usually carried and handled; and so the doctrine has been extended to every species of transportation.

In *U. S. ex rel. Morris et al. vs. R. R. Co.*, 40 Fed., 101, 103, it is said by WALLACE, J.:

"These sections (Interstate Commerce Act), by declaring the special acts of discrimination unlawful, qualify materially in some respects the common-law rights and obligations of the carriers mentioned. By the common law, although public carriers are not permitted to make unreasonable discrimination in performing the services which they undertake between those whom it is their duty to serve, *the discrimination which is unreasonable is such only as inures to the undue advantage of one person or class of persons in consequence of some injustice inflicted upon another.* The carrier is not obliged to treat all who patronize him with absolute equality. Thus it is his privilege to charge less than fair compensation to one person, or to a class of persons, and others cannot justly complain so long as he carries on reasonable terms for them." Citing:

Menacho vs. Ward, 27 Red. Rep., 530.

From the foregoing authorities, and especially the Supreme Court case of the *Commission vs. Railway Co., supra* (145 U. S., 263), even the general or common law remedy was limited to a reasonable charge, and consequently *the sole remedy was a common law action for damages. Equity had no jurisdiction and could not act in such a case.*

And in *I. C. C. vs. C. N. O. & T. P. R. Co.*, 167 U. S., 505, 506, the Court in substance says that the Interstate Commerce Act *has incorporated in it* this common law principle and obligation; and it also directs the Commission to execute and enforce the provisions of the Act. In addition to this the Commission has other important duties, among which are the general duty of inquiring as to the management of the business of the carriers, to keep itself informed as to the manner in which the same is conducted; the right to compel complete and full information as to the manner in which such carriers are transacting their business, to see that there is no violation of the long and short haul clause, that there is no discrimination between individual shippers, and that nothing is done by rebate or other device to give preference to one as against another, and that no undue preferences are given to places or individuals, but that in all things the equality of right which is the great purpose of the Act, shall be secured to all shippers (pp. 505, 506).

From the above authorities and from a careful analysis of the act itself, it is seen that whatever was before the act the common or general law, applicable, is incorporated in it, and that only by and through the Interstate Commerce Act have the remedies and rights been secured to either "citizen," "firm,"

"corporation," "association," "locality," "body politic" or "municipality" against either unjust discrimination in the rendition of like services under similar circumstances and conditions, or to prevent undue or unreasonable preference, or to prevent an unreasonable charge, or other offenses inhibited by the Act. To this there is no exception, except possibly an action by a person for *damages* (Secs. 8, 9), and the right to a *mandamus* given by the Act of March 2, 1889.

In this connection we invite the Court's attention to the governing rule of statutory construction.

In *Sutherland on Statutory Construction.* § 204, the author says:

"If a new power be given by an affirmative statute to a certain person by a particular designation, although it be an affirmative statute, still all other persons are in general excluded from the exercise of the power, since *expressio unius est exclusio alterius.* Thus, if an action is to be brought before the justices of Glamorgan in sessions, it cannot be brought before any other person or in any other place. If a thing is limited to be done in a particular form or manner it excludes every other mode, and affirmative expressions introducing a new rule imply a negative."

And in § § 325-6 he says:

"The maxim is applicable to a statutory provision which grants originally a power of right. In such cases the power or right originates with the statute, and exists only to the extent plainly granted; the right while inchoate, and the power so far as not exercised, cease, if the statute be repealed, and if the statute provides the mode in which they shall be exercised, that mode must be pursued and no other. This conclusion is almost self evident; for since the statue creates and regulates, there is no ground for claiming or proceeding except according to it. In other words, where a

statute gives a new right and prescribes a particular remedy, such remedy must be strictly pursued and the party is confined to that remedy. 'The rule is certain,' says Lord Mansfield, 'that where a statute creates a new offense, by prohibiting and making unlawful anything which was lawful before, and appoints a specific remedy against such new offense (not antecedently unlawful), by a particular sanction and particular method of proceeding, that particular method must be pursued and no other.' "

Also:

"Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode; all other modes are excluded."

And in note to § 204 he says:

" *When the statute creates a liability not existing at common law, and gives a particular remedy, here the party must adopt the form of remedy given by the statute.*"

We have seen that this Court in the case of *I. C. C. vs. B. & O. R. R. Co., 145 U. S., supra*, and the other cases cited (and there have been a number of subsequent decisions of this Court to the same effect), has held that *a new power* and right were given by this Act, and strictly within the foregoing rules of construction, to certain persons *by particular designation* for an action or proceeding upon a statute, and under and by virtue of which statute a liability was created not existing at common law (or under the general law), and *giving a particular remedy*, and which statute *creates and regulates*, and which gives *a new right*, and which remedy must be directly pursued, and whereby authority is given to do *a particular thing* by a *particular* mode, *excluding all*

other modes, whereby and by such affirmative legislation a "*new rule is introduced implying a negative.*"

Our contention is that upon the authorities and upon a fair construction of the act itself, as we shall presently see, and by every rule of construction, the Interstate Commerce Act is necessarily exclusive as a rule or system of procedure for primary examination into the facts, and in the language of the Act for "the execution and enforcement of its provisions" (Sec. 12).

In support of our contention we refer to the case of *Fourth National Bank vs. Francklyn*, 120 U. S., 747, in which this Court held that when a law creates a right and remedy "that remedy alone is the remedy." It follows, logically, that where, as here, the Congress delegates its power to a commission to invoke equitable relief by injunction only after that commission has done certain other pledges, then that remedy is exclusive.

In *U. S. vs. Hudson*, 7 Cranch, 32, it is held that the Courts of the United States have no common law jurisdiction in cases of libel against the Government of the United States, and in the discussion of that question it was held, as it has been consistently held from that date to this, that:

"Of all the courts which the United States may, under their general powers, constitute, one only—the Supreme Court—possesses jurisdiction derived immediately from the Constitution, and of which the legislative power cannot deprive it. *All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer.*

"It is not necessary to inquire whether the general

government, in any and to what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation."

The foregoing line of reasoning, followed in repeated decisions, leads, we submit, irretistibly to the conclusion that no Court of the United States has jurisdiction, right, or power to hear and determine causes, except such as are derived from Congress, and the only laws enforceable in such Courts are such laws as are enacted by Congress in pursuance of the Constitution.

However this may be in general, it is all sufficient for the present cause that discrimination between "localities" is only made illegal by Section 3 of the Interstate Commerce Act. Therefore it is a right newly created by the Interstate Commerce Act. Equality of treatment as between localities being a right created by the Interstate Commerce Act, it follows that the remedy therefor prescribed by that act is the only remedy, and that remedy is a preliminary investigation by the Commission (see Sections 3, 13, 15 and 16), and not by an independent suit in equity without any such preliminary investigation or findings by the Commission. Congress has prescribed *for discrimination between localities* a remedy by and through preliminary action and findings by the Commission, and it has nowhere provided that an independent bill in equity may be brought in such a case. On the contrary, the right to file such a bill is excluded by the very nature of the specific remedies which are provided in the act, to wit, investigation by the Commission in the mode prescribed by the act, and the

enforcement of its findings as in the act provided (Sections 3, 13, 15 and 16). These specific remedies and the rights of the railway carrier thereunder are inconsistent with the right to maintain such a bill as the present.

And this view does not at all conflict with *West. Union Tel. Co. vs. Call Pub. Co.*, 181 U. S., 92, which was on a cause of action cognizable by the common or general law.

II.

THE INTERSTATE COMMERCE ACT MAKES SPECIAL PROVISIONS FOR THE REMEDY BY INJUNCTION, AND SUCH REMEDY IN CASES LIKE THE PRESENT CAN ONLY BE OBTAINED THROUGH A PREVIOUS INVESTIGATION BY THE INTERSTATE COMMERCE COMMISSION.

As we have endeavored to show under proposition (I) the Act prescribes a complete procedure—civil and criminal. Under the criminal branch, wholly covered by certain sections of the Act, certain violations are made misdemeanors and felonies and denounced by pains and penalties. Under the civil branch, covered by certain other sections, as we shall presently see, the usual and necessary remedies at law and in equity are provided and distributed.

In all civil actions for recoveries, as at common law, and which are within the seventh amendment of the Constitution, and where a jury is demandable of course, provision is made to go into the federal courts on the law side, and also suits for equitable relief in the same

courts on the equity side, and providing especially for the remedy by injunction there, *but in cases like the present only and solely by and through the Commission*, as we shall now proceed to show.

Analysis of the Act as to Remedies.

By the provisions of § 8 the general liability of the common carriers violating the act to the injury of any *person* or *persons* is declared. This liability is one for damage in such amount as may be found, with attorney's fees and costs. This is the complete provision of this section.

By the provisions of § 9 such persons as are so damaged are given two distinct remedies; but the section expressly provides they shall not have both and must elect. One remedy is by suit at law "*by suit in his or their own behalf*, for the recovery of the damages to which the carrier is made liable" by § 8. The other remedy is upon "*complaint to the Commission as hereinafter provided for.*"

§ 10 is penal and is limited to the provision making the willful omission or commission of the prohibited things in violation of the Act, misdemeanors, and providing for the punishment of the same.

It is important, as respects equity jurisdiction, to notice that this section makes *the corporation itself* as well as its officers and agents guilty of a misdemeanor and indictable and punishable for any willful violation of *any* provision of the Act.

§ 11 creates the Interstate Commerce Commission.

§ 12, as we shall hereafter more fully show, defines the powers of the Commission, generally. We will

only say in this place, that this power by express, provision, and interpretation is limited to (1) primary investigation of facts; (2) to execute and enforce the provisions of the act, *but only in the mode* and manner and by the procedure provided by the act now under consideration.

Sections 13 to 16, inclusive, provide a complete plan of procedure, in cases like the present, aad in terms and purpose are utterly inconsistent with the right of the United States to bring or maintain the present bill.

§ 13 provides substantially, that:

"Any person, firm, corporation or association, or any mercantile, agricultural or manufacturing society, or any body politic or *municipal organization*, complaining of any of the things done or omitted (in the foregoing sections) may apply to the Commission *by petition*, which shall briefly state the facts, whereupon the Commission shall forward to the carrier so charged a statement of such charges, who shall be called upon to satisfy or answer such complaint."

"But if such carrier shall within a specified time make reparation, it shall be relieved of liability. But if it shall not satisfy the complaint within the specified time, or there shall appear to be any reasonable grounds for investigation, it *shall be the duty of the Commission to investigate the matte s complained of* in such manner as it shall deem proper.

Said Commission *shall in like manner* investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory at the request of such commissioner or commission, and may institute any inquiry on its own account in

the *same manner* and to the same effect as if complaint had been made.

No complaint shall at any time be dismissed because of the absence of direct damage to the complainant."

Inasmuch as this section, in connection with Section 3, extends not only to "persons," "firms" and "corporations," but to "municipal organizations" and "localities," and also to railroad commissions and commissioners of the several States and Territories, entitling them or any of them to complaint to the Commission of "*anything* done or omitted" in contravention of the act, and inasmuch as it is provided that no complaint shall be dismissed because of the absence of direct damage to the complainant, it is thus demonstrated that Section 9 was intended to prescribe proceedings not only where individuals, but also where the public and localities were interested; and inasmuch as this section makes it by express and imperative words the *duty of the Commission itself* to investigate matters complained of, it is inconsistent *both with the language and purpose of the act to hold that* the Commission may abdicate this duty and unload it upon the Courts, as the Commission has sought to do in the present instance.

Consistently with this view and to carry out the purpose of the Act, the provisions of Sections 14, 15 and 16, presently to be referred to, are all based on the idea that the commission will *itself* discharge this personal or official duty, as an examination of the language of these sections will clearly show.

And in this connection we may observe that the counsel for the appellee in their brief (pages 15 and 16), after quoting the Amendatory Act of March 2,

1889, and referring to Section 9, says (page 16 of their brief) :

" under the construction contended for by appellant an application for a writ of mandamus could not be made under the provisions of the Amendment to the Act thus quoted (to wit, the Act of March 2, 1889), unless the person applying for the writ had first submitted his grievance to the Commission."

This is a *non sequitur*, for under Sections 8 and 9 an express right of action in the Courts is given to any person or persons injured for the full amount of damages sustained, and in the Act of March 2, 1889, jurisdiction is expressly given to the United States Courts to enforce, at the instance of any relator against whom any discrimination is made, the provisions of the Act securing equality of terms and conditions; but it will be noted that the remedy specially prescribed by Congress in such cases is *mandamus*, and this remedy of *mandamus* thus specially provided for necessarily excludes the remedy by injunction.

§ 14 provides that:

" Whenever an investigation shall be made by it, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found.

" All reports of investigations made by the commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of."

§ 15 provides that:

"*If in any case* in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it *shall be the duty of the Commission* to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier *to cease and desist* from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and, if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining a statement to that effect shall be entered of record by the Commission, *and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.*"

All this is, we repeat, utterly inconsistent with the right of the United States to bring or maintain such a bill as the present, as such a course deprives the Railway Company of the right to "desist", &c., expressly given to it.

§ 16 provides substantially (it being too long to qoute here in full):

"That whenever any common carrier shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by

this Act, *not founded upon a controversy requiring a trial by jury* as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition, to the circuit court of the United States sitting in equity * * * alleging such violation or disobedience as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable."

It then provides that the Court shall proceed to hear and determine the matter speedily and informally, and that the Court shall have power, if it thinks fit, to direct and prosecute in such mode and by such persons as it may appoint, such inquiries as the Court may deem needful to form a just judgment upon such petition, and on such hearing the findings of fact and report of the Commission shall be *prima facie* evidence.

It further provides:

"And if it be made to appear to such Court on such hearing or on report of any such person or persons that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such Court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same."

It then provides for punishment for violation of the order of the Court, and for appeal to the Supreme Court. It also provides that when such petition shall be filed or presented by the Commission it shall be the

duty of the District Attorney, under the direction of the Attorney General of the United States, to prosecute the same.

It further provides that:

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this Act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the Circuit Court of the United States sitting as a court of law * * * alleging such violation or disobedience as the case may be; and said Court shall by its order then fix a time and place for the trial of said cause."

It further also provides that at the trial the findings of fact made by the Commission, as in equity cases, shall be *prima facie* evidence; also for a jury, if demanded, and for appeal as in equity cases. It is further provided that for the purposes of the act, excepting its penal provisions, the Circuit Courts of the United States shall be deemed to be always in session.

The foregoing is substantially all of said § 16 applicable to procedure in civil cases.

All of the succeeding sections relate to the organization of the Commission, the conduct of its business, its general offices and office force, and its duty to make certain reports, and to certain exceptions within the act not applicable to procedure, except the last section, being § 10 of the Amendatory Act of 1889, which gives the right to any person, firm or corporation to sue out in the Circuit or District Courts of the United States

the writ of mandamus to prevent certain violations, but which is not applicable to the case at bar.

The foregoing is a complete summary of the procedure we have hereinbefore fully described for actions at law and suits in equity in the Circuit Courts of the United States.

Legal Effect of the Act as to Equity Jurisdiction.

The foregoing analysis of the governing provisions of the sev-eral sections quoted (being every provision for procedure civil) enforces the conviction that (1) there the only remedy by injunction is, in cases of alleged discrimination between localities, the one here provided; (2) that in order to obtain it there must first be an act of commission or omission creating the liability prohibited in § 8; (3) the person, firm, &c., injured must make complaint as in §§ 9 and 13 provided, or sue at law as in § 9 provided, thus, "*electing*" his remedy as that section requires. If he elects to sue for damages, that is an action within the seventh amendment as provided in § 16, and, of course, not remediable by injunction. Besides, if the carrier is solvent, there is adequate remedy at law. (4) But, if he does not elect to sue as in § 9 provided, *he must* "*make complaint to the* Commission" (§ 9); and § 13, extending the provision, provides that:

"*Any such person, firm, corporation, municipal organization*, etc., complaining of anything done or omitted to be done (as in § 8 provided) by any common carrier in contravention of the provisions of the Act may apply to said Commission by petition (as provided in § 9) briefly stating the facts, "*whereupon* a statement

of the charges shall be forwarded by the Commission to the carrier" (§ 13). And also:

"Thereupon the Commission must give the carrier 'notice' and 'an opportunity to *desist*' or 'make *reparation*'" (as provided in §§ 13, 14 and 15).

§ 15 provides that:

"If within the time specified it appears to the Commission that the carrier has ceased from such violation (as provided in § 15) and made reparation, a statement to that effect shall be entered of record and the carrier relieved of liability or penalty for such particular violation."

But, "*whenever any carrier shall, as defined, violate or refuse or neglect to obey or perform* any lawful order of the Commission *not founded* upon a controversy requiring a jury trial,"

then application may be made by petition by the Commission or injured person to the Court as heretofore shown by § 16.

§ 13 also provides that:

"The Commission may in like manner investigate any complaint of the railroad commission of a state or institute inquiry on its own motion *in the same manner and to the same effect* as upon complaint."

In all cases of investigation the Commission

"*Is required to make a report of the facts*, together with its recommendation, and which report and findings shall be *prima facie* evidence," etc. (§ 14).

Thus, as we have said, is provided a complete civil procedure on both the law and equity sides of the Courts leading up on the equity side in non-juris cases to the remedy sought here, but *only* and *wholly* by the very steps provided as conditions precedent thereto.

Even if the complainants were claiming in this suit injunction against *unreasonable charges per se*, we say they can not get it for two reasons: (1) If they seek it independent of this Act and at common law, then injunction is not and never was the remedy for this offense at common law, especially where as here, there is no claim of insolvency; (2) If in equity, then they must reach the relief sought by the provisions of the Act—the only possible way; (3) If by virtue of and under the Act (conceding that the facts makes it possible in that way), then they have utterly failed to comply with it.

If they seek, as they do, injunction against *unreasonable discrimination and preference between localities*, we have shown there never was such a remedy for such acts at common law, if indeed there ever was or is any national common law in such a case.

Before the amendment to §16 giving the right of recovery at law there existed only the right of equitable relief.

Malcoon vs. C. & N. W. R. Co., 3 I. C. R., 715.

In this case the Commission cite a number of former cases in which they held that where complainant had been subjected to unreasonable prejudice and unjust discrimination and claimed damages, and where the Commission found his complaint well grounded and ordered the carrier to cease and desist therefrom, the Commission declined to go into the question of damages for the reason that:

"Under the seventh amendment to the Constitution of the United States the defendant in any case of damage is entitled to a jury trial."

The Commission further say:

"The amendment of March 2, 1889, was made to cover this feature of the statute."

The Commission further state on page 716 that:

"In most of the complaints brought before the Commission since the amendment of the sixteenth section the question of reparation for past damages has not been involved. In some cases where that question was involved its determination seemed so particularly appropriate for a jury that the Commission did not consider it; deeming it best for all parties that the question of the amount of damages should be settled by a jury in the regular courts, notwithstanding the fact that it has been held by the Circuit Court of the United States for the Western District of Pennsylvania in the case of *Riddle vs. N. Y., etc., R. Co., supra*, that where the question of reparation for damage has been submitted to the Commission it cannot be subsequently made the subject of a suit in court though the Commission has declined to pass upon it."

It further says:

"Although reparation for alleged violations of some of the provisions of the first four sections of the Act to Regulate Commerce is the principal and important remedy sought in most complaints, yet reparation in many cases is not an unimportant incident. Therefore so long as these rulings of the courts last mentioned stand as the law it seems to us a plain duty to complainants to pass upon the question of reparation for damages whenever a claim is made therefor. Indeed it seems to us to rise beyond mere discretion and become an imperative duty; otherwise the dual remedy which Congress seemed to contemplate would be defeated; even more, one of the remedies is lost under an application of the somewhat technical doctrine of the *election* of remedies operating in contravention at

least of the spirit of the enactment as well as the demands of justice."

We cite this to show the recognition by the Commission of our contention for the two specific elective remedies, one at law, the other by injunction.

Hitherto Uniform Course of Procedure in Cases of this Character is Against the Right to Maintain the Present Suit.

An examination of the whole course of the Interstate Commerce Commission will disclose that they have in every single instance, excepting in the case at bar, pursued the course so clearly defined by the act, and it is manifest that the Commission itself recognizes the procedure we insist upon here.

But they find an easy, natural and speedy remedy to reach the equity side of the court through and by the provisions of the act requiring them in every instance to hear the facts and report them as *prima facie* evidence to the court for use of complainant when he sees fit to resort to the court, or the Commission itself exercises its right to do so, and, as provided in the act, makes this report the basis of its action.

Moreover, there is an uniform recognition in the decisions of this Court and other Courts of this procedure for the Commission in its administrative work of investigation and execution and enforcement of the provisions of the act.

The case of *I. C. C. vs. N. E. R. Co.*, 74 Fed. 70; 5 I. C. R., 650, decided by Judge SIMONTON, April 30th, 1896, was a suit where the Truck Farmers' Association of Charleston filed complaint be-

fore the Commission against an unreasonable and unlawful rate on their products, an order to cease and desist was entered by the Commission and for an adjustment of the rates. A copy of the order was served upon the railway companies defendant. The railroad companies failing to obey the order, the Commission filed its complaint against them charging that defendants wilfully failed and neglected to obey and conform to the requirements of the Interstate Commerce Commission as set forth in the original order of the Commission, and praying for writ of injunction restraining defendants, their officers and agents, from such disobedience, and that the Court would make a final order for a mandatory and permanent injunction. The Court held, as shown by the syllabus, that:

"The sole authority of the Commission to institute proceedings in the United States Circuit Court to enforce its orders, is derived from the Interstate Commerce Act, and in its exercise it is bound by and must confine itself within the terms of that statute; that said Act authorizes a resort by the Commission to the United States Court only in case of the violation of or neglect or refusal to obey or perform a lawful order or requirement of the Commission."

If this is a sound construction of the act (as we insist it is) it is fatal to the right to maintain the present suit, and the demurrer to the bill ought to have been sustained and the bill dismissed and the decree below ought to be reversed.

And in the case of *I. C. C. vs. L. & N. R. Co.*, 73 Fed. Rep., 409; 5. I. C. R., 657, decided April 17th, 1896, it was held that:

"The jurisdiction of the United States Circuit Court is limited to an approval or disapproval and to an en-

forcement or refusal to enforce an order of the Commission; that the Court may go fully into the proof to determine whether it will approve an order made by the Commission and may hear any additional proof; that the function of the Commission is both *quasi* judicial and administrative in its nature; that it is required to make reports in writing in respect of complaints made to it; that such reports must include the findings of fact, and such findings to be deemed *prima facie* evidence; that it was the intention of Congress that the procedure before the Commission should substantiallly conform to that before a court charged with the duty of finding facts and giving a judgment thereon, or to the investigation or report of a referee or special master in chancery passing on both facts and law; that in order that the finding and opinion of the Commission should have value it should conform to the purpose of Congress requiring such proceedings."

An examination of this case will show that the procedure for which we are contending here is recognized as a condition precedent to equitable relief.

This view, if sound, is fatal to the present suit.

And in the case of *Swift & Co. vs. P. & R. R. Co.*, 58 Fed. Rep., 858; 4 I. C. R., 633, and *Swift & Co. vs. P. & R. R. Co.*, 64 Fed. Rep., 59, opinions by Judge GROSSCUP, it is held that:

"Outside of the Interstate Commerce Act there is no law of the United States as a distinct sovereignty, imposing any restraint upon the imposition by a carrier of unreasonable rates; that the Interstate Commerce Act prescribes the only procedure by which the courts can obtain jurisdiction over interstate commerce cases.

That *there being no pronouncement of Congress upon the subject of interstate commerce, either expressly or impliedly outside of the Interstate Commerce Act,*' and

the action before him at that time for unreasonable charge, he held that the suit, 'not having been brought under the Interstate Commerce Act there is no law either of the United States or of the state applicable to the case in hand and there can therefore be no recovery.'"

This decision, also, is fatal to the present suit.

Also, see:

State vs. R. R. Co., 17 Neb., 647.

I. C. C. vs Ala. M. R. Co., 168 U. S., 174;

I. C. C. vs. C. N. O. & T. P. R. Co., 167 U. S., 495–506; and cases cited.

Texas Pacific R. Co. vs. I. C. C., 162 U. S., 204.

These cases, while not deciding the particular question here, yet all refer to this procedure and recognize it as defining the power and right to solely and primarily hear and determine cases of the kind at bar for violations of the first, second and third sections of the act.

It is also to be noticed that every case of importance and in which this Court has been called upon to determine the relative powers of the Commission and the Courts and their relation to the Interstate Commerce Act, has arisen out of proceedings had under these various sections of the act, constituting, as we claim, the procedure, and the sole procedure, by which these questions can be raised and litigated. That is why they have reached the Supreme Court of the United States.

So almost every case which has come before the courts has originated before, and in a primary hearing by the Commission, and not in any single instance, *until the present suit*, originally with the courts. It is a sig-

nificant fact that in the innumerable suits which have been litigated, save and except the present solitary suit here, both complainants and the Commission, as well as the courts, have deemed it proper and necessary to institute the proceedings in the first instance before the tribunal created therefor by the act itself.

There can at least certainly be no controversy as to whether the full power of "investigation" and "regulation" primarily, at least, is conferred upon the Commission. We are all agreed, as we understand it, in harmony with all the authorities, that the power which Congress had to "*investigate*" and to "*regulate*" interstate commerce and all means and vehicles of interstate commerce, was conferred upon this Commission. We nowhere claim Congress has taken the power or right from the courts in the proper judicial actions or suits by proper parties according to the rules and principles of law and equity, to finally hear and determine the questions of a judicial nature involved in such actions or suits, nor that the Commission cannot institute as prescribed in the Act certain other suits direct. We simply claim that owing to the inefficency of the general law and of the remedies under it, the Commission was created with full and *sole* power and right of "regulation," and "execution" and the further right and power to primarily *hear, determine and report* upon all complaints growing out of interstate commerce. *This* power, it will not be denied, is *exclusive*, certainly in cases not actionable by the common or general law. This is the only power and function the Commission has, as interpreted by the courts, in the cases just cited.

Inequality and Injustice of the Present Procedure. If sustained, it Deprives Carrier of the Right Expressly Given to "Desist" or Make "Reparation," &c.

Moreover, if the Court has original jurisdiction, as claimed by counsel--the power of proceeding at the mere request of the Commission—then inequality results because, if the Government presents a cause against a carrier through the Commission, the defendant then has the right of a *preliminary "hearing and investigation,"* and of "desistance" and "reparation" without further proceedings (Secs. 15, 16); but if the Government makes its attack originally in the courts, as here, then the defendant is denied the rights and privileges guaranteed by the act, and there is discrimination against the alleged discriminator. The weal or the woe of the defendant then depends on *how* the Government elects to make the attack. In some cases it will be prosecuting in the courts; in others, maybap at the same time, by the Commission. Sometimes the Commission itself will prosecute in the courts as they may do under the act. At others, the United States will prosecute either upon its own motion or upon the motion of the Commission, who may, according to the theory of of the Government's counsel, command the Government to prosecute, as in this case, quite independently of the Commission. This is clothing the Commission with undreamed of power, and subverting the whole power of Government to the behests and dictates of the Commission, while at the same time the carriers of the country, denied the constitutional equal protection of the laws vouchsafed by the Fourteenth Amendment,

are driven to this or that forum, in this or that jurisdiction, at the caprice of the Commission, the Government or the complainant. This is the *reductio ad absurdum* of the whole theory.

Moreover, the mode of trial as prescribed by this act is one way if tried by the Commission and through the Commission; another, if the case be originally instituted in the courts. The act guarantees to the common carrier and to the complainant:

"A proceeding to hear and determine speedily, as courts of equity, without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do equity" (Sec. 16).

But under this novel, original, unique, independent proceeding in the United States Courts, the right of "desistance," of "reparation," of any settlement which may be satisfactory between the parties (Secs. 15, 16), is denied to them in all cases where it is the pleasure either of the Commission, the Government, or the party complaining, to institute such original and independent suit.

We insist that the provisions of the act guarantee to every citizen and every carrier a consistent, uniform and established mode of procedure applicable alike to all parties, and all the foregoing decisions recognize it.

Judge Hook's Recent Decision Against the Right to Maintain This Bill.

That an original bill in equity will not lie against a railway company for discriminatory rates without the Commission has first investigated and acted, has been

recently decided by the United States Circuit Court for Kansas in *Vanderslice-Lynde Mercantile Company vs. Mo. P. Ry. Co.* As the opinion of HOOK, J., is not as yet regularly reported, we give it in an Appendix to this brief. That opinion shows very clearly how revolutionary of all preceding ideas and procedure the maintenance of an independent bill in equity, without any preliminary investigation by the Commission for discrimination between localties, would be.

Under these views the decree below is wrong and must be reversed and the bill dismissed.

III.

SECTION 12, UPON WHICH THE SUIT HERE IS ALLEGED IN THE BILL TO BE GROUNDED, DOES NOT AUTHORIZE COMPLAINANTS TO BRING OR THE COURTS TO HEAR THE SAME.

THE CONTROVERSY SET FORTH IN THE BILL—NAMELY, WHETHER THE RATES COMPLAINED OF ARE DISCRIMATORY, AS ALLEGED IN THE BILL, IS LEGAL AND NOT EQUITABLE IN ITS NATURE, AND ENTITLES THE DEFENDANT, UNDER THE SEVENTH AMENDMENT TO THE CONSTITUTION, TO A TRIAL BY JURY. SAID SECTION 12 DOES NOT ATTEMPT TO CHANGE OR ENLARGE THE JURISDICTION OF THE CIRCUIT COURTS IN EQUITY, OR TO AUTHORIZE A BILL IN EQUITY, SUCH AS THE PRESENT BILL, TO DETERMINE THE REASONABLENESS OF RATES OR DISCRIMINATION IN RATES, EITHER IN THE NAME OF THE UNITED STATES OR IN THAT OF THE COMMISSION, AND THE CIRCUIT COURT IN EQUITY HAS NO JURISDICTION, EITHER GENERALLY OR UNDER THE

INTERSTATE COMMERCE ACT OVER THE PARTICULAR CONTROVERSY PRESENTED BY THE BILL. THE REMEDY AT LAW BY ACTION OR BY MANDAMUS IS ADEQUATE.

The language of § 12 is that:

"The Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this Act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created, and the Commission is hereby authorized and required to execute and enforce the provisions of this Act, *and upon the request of the Commission it shall be the duty of any District Attorney of the United States to whom the Commission may apply, to institute, in the proper court, and to prosecute under the direction of the Attorney-General of the United States, all necessary proceedings for the enforcement of the provisions of this Act and for the punishment of all violations thereof.*"

It is claimed by counsel for United States (Brief, POINT V., p. 41) that this provision gives express authority for the Commission, without preliminary investigation, without notice to the carrier, without a hearing or order or opportunity to desist, or to make reparation, or to have the matters of difference amicably adjusted as the act (Secs. 13, 14, 15) provides and guarantees, to request or order the District Attorneys of the United States to institute an original injunction suit against such carrier, notwithstanding the express provisions of the act relating to the institution and procedure in a suit of that character. But a careful examination of this provision fails to show that it was

the intention of Congress to do more than authorize the Commission to call upon counsel, where counsel are needed, to represent it in such enforcement of the provisions of the act as the Commission is authorized by other provisions of the act to enforce. In other words, the power of employment of counsel for enforcement is limited to the power, right and duties of the Commission in the act of enforcement. If, as we believe, we have conclusively shown, the Commission has the right (1) to appoint and have a hearing before it; (2) to make an order; (3) in case of disobedience to make a case or suit of it by bringing it under the provisions of § 16 into the courts to obtain the remedy here sought and there prosecute it to effect, then this is one of the cases in which the United States Attorneys can very properly be called to enforce the provisions of the act.

What is the reason that this provision may not, *inter alia*, refer to such suits, and to the bringing thereof in the very manner in which we insist that the law requires it to be brought? There is certainly in such proceedings much use for counsel and a very proper case in which counsel should be called under this general provision of this section.

But there are other provisions of the act which expressly provide for calling in the United States attorneys, namely:

In § 6, if a carrier refuses to file or publish its schedules of rates it is in addition to penalties subjected to writs of mandamus and injunction in the United States Circuit Courts to enforce the provisions of that section. This suit does not fall within said Section 6.

In § 9 it is provided actions for *damage* may be brought direct by the party injured in the United States District or Circuit Courts, this being one of the two remedies—by action at law direct, or, as we have seen, by injunction—(as the party may elect) *after the Commission has passed upon it*, as heretofore shown (Secs. 13, 14, 15, 16).

In § 10, and other sections, actions may be brought in said courts for the penalties therein provided and for damages "in an action on the case;" and in § 12 itself is provision for compelling attendance of witnesses and invoking the aid of the Federal Courts together, of course, with all their machinery. *No doubt that, as there is no express provision, or was none before this amendment of the twelfth section, by which the United States attorneys could be required to act, in all cases of violations of the act, this provision of the twelfth section for doing so was deemed expedient, and this explains the object of the provision.* This amendment to Section 12 extends the like limited provision found in Section 16 to ALL cases, and thus was the purpose of the amendment and gives it full effect.

Note in this connection that the clause in question also specially requires the district attorneys to "prosecute all necessary proceedings for the *punishment* of all violations of the Act"—all of which shows that the sole purpose and intent was to provide a legal force for the use of the Commission in both the civil and criminal procedure which we have discussed, but only to "enforce the Act" and "punish violations" in the mode and manner of that procedure.

It is wholly unwarranted to conclude from a provision that the Commission can call in the Federal attorneys, therefore, they can call in the Federal Courts to

do that, which under the provisions of the act neither the Commission nor the Courts, can do independently. Section 12 as amended, like section 12 as it stood before amendment, is to be construed in *pari materia* with the rest of the act. Indeed, the very fact that the Congress deemed it necessary to authorize them by this amendment to call in Federal attorneys, *shows that the provision was exclusively auxiliary to the Commission*, for if it could order the Courts, as in this suit, to take cognizance of a case in the first instance without acting upon it itself, *the provision is idle, for the Federal Courts of the country and the people already had the use af the federal machinery, including the federal attorneys.*

If we recur to the legislative history of the amendment to the 12th section as contained in the Congressional Record, September 13, 1888, Vol. 19, Part 9, Cong. Rec., 50th Cong., 1st Sess., p. 8577; *id.*, Vol. 20, Part 2, p. 1404, February 1, 1889; *id.*, February 4, 1889, p. 1475, it will be seen, as we think, that it was not intended by the amendment to Section 12 to enlarge or diminish or change existing remedies or modes of procedure, or to do anything more than to charge the Commission with the duty of taking the initiative for the enforcement of the Interstate Commerce Act by and through the remedies specifically provided for in the Act itself; much less was it intended to revolutionize the Act and dispense with the investigation and procedure on the part of the Commission therein so particularly provided for and required.

This Section 12 empowers the Commission to "execute and enforce the provisions of the act," and they are empowered to "call upon any district attorney of the United States to institute, in the proper court, and prosecute under the direction of the Attorney-General, all necessary proceedings" (1) "for the enforcement of the provisions of the act" (2) "or for the punishment of all violations thereof." This is all there is in Section 12 authorizing the Commission in the *execution and enforcement of the provisions* of the Act to apply to any District Attorney of the United States.

Now, what are the Commission by this Act (not this section only) authorized to apply to the District Attorneys to do? The answer is that this section, in addition to the other sections which specifically authorize an application to the District Attorneys, also authorizes and empowers the Commission to call upon these District Attorneys to enforce every and any provision of the Act which they are authorized and empowered to execute and enforce.

It seems plain that it was the intention of the Congress to fix, by definite terms in Section 12, the right and power to invoke the aid of the United States attorneys, under the direction of the Attorney-General, in the execution and enforcement of the provisions of the act, in the absence of any provision for a special counsel. It must have been apparent to Congress that, in the absence of any provision therefor, the commission would need an attorney, and they simply placed that duty and responsibility upon the District Attorneys and the Attorney-General.

This construction of Section 12 not only does not deprive this amendment of any substantial force or efficacy, but quite upon the contrary gives it the sub-

stance, force and efficacy which it would not otherwise have; for, according to the interpretation given it by the other side, its main use and purpose is to give the commission the aid of the Department of Justice only when an original suit like the one at bar has been brought.

What is meant by Section 12 is that the Commission, being authorized and required to enforce the provisions of the Act, and being authorized and empowered to "institute in the proper court and to prosecute all necessary proceedings for the enforcement of the provisions of the Act and the punishment of all violations thereof," it "shall be the duty of any district attorney of the United States to whom the commission may apply, to institute in the proper court and to prosecute under the direction of the Attorney General of the United States" all such proceedings.

Section 12 not only defines but limits the right and power of the Commission to call upon the United States Attorneys to do anything except to enforce the express provisions and remedies of the Act. There cannot be found, either in Section 12 or any other section of this act, any authority or right whatever either to institute an independent original action such as is brought here, or to prosecute any suit or action except the suit or actions specified in the Act.

These views seem to be unanswerable and demonstrate that the present bill is not maintainable and that the decree below is wrong.

This Form of Suit Not Authorized by Section 12.

We also make the distinct point that neither Section 12, nor any other provision of the Interstate Commerce Act, or any act of Congress, undertakes to give authority to bring an original and independent suit in equity in the name of the United States or in the name of the Commission, or any one else, to have determined the reasonableness of rates fixed by a railway company, or the question of alleged discrimination under Section 3 in favor of one locality to the preference or disadvantage of another locality, which is the gravamen in the present bill. If the United States should undertake to confer such jurisdiction the provision would contravene the seventh amendment to the Constitution of the United States, if such a controversy would, as we insist, be *legal* and not *equitable* in its nature. Under the Constitution of the United States law and equity must be kept distinct and separate, and this is observed throughout the Interstate Commerce Act, as will be seen by reference, *inter alia*, to Sections 6, 10 (at end of section), 13 and 16, and the amendatory Act of March 2, 1889, which expressly provides for the remedy of mandamus.

The act provides that violations of it may be prevented or redressed by indictment, by actions at law for damages by parties interested or injured, by proceedings in mandamus and in the prescribed cases (Secs. 6, 16) by proceedings in equity.

The common law made no provision for unjust discrimination by a common carrier between localities, as for example Omaha and Wichita. Unjust discrim-

ination between localities is forbidden by Section 3 of the Interstate Commerce Act. The remedies for its violation are only those which are prescribed by the act or suitable to the legal nature of the case to enforce the right. Now, the language of Section 12 as amended is simply that "upon the request of the Commission it shall be the duty of any District Attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof" at the cost and expense of the United States. This act uses only the phrase "institute and prosecute all necessary proceedings" for the enforcement of the act and punishment of violations thereof. It does not prescribe what these proceedings shall be. The Commission might request proceedings by indictment, which indictment would have to be found, presented and tried in the regular way. If a civil remedy is sought, it will have to be such as is proper to the case, and inasmuch as the case stated in the bill is legal and not equitable in its nature the proceedings must be at law and not in equity, at least where Congress has not expressly provided that such proceedings may be in equity.

There is nothing in the act which enlarges the jurisdiction of the Circuit Court either generally or under the Interstate Commerce Act so as to authorize a bill in equity to have determined the question of unreasonable discrimination of rates between *localities* where there has been no previous investigation and finding by the Commission. That equity in such cases has no jurisdiction is well established.

IV.

No Remedy in Equity for Case Stated in Bill: The Interstate Commerce Act Confers no General Equity Jurisdiction, on the Contrary a Resort to an Original Bill in Eqtity is Excluded by the Special Provisions of the Act as to Remedies: The Remedy by Mandamus Adequate.

It is an indisputable proposition, in the absence of an express statute, that remedy by bill in equity is not the proper remedy to enforce the performance by a corporation of public duties prescribed by law, and especially to enforce by injunction penal statutes.

There is no such statute applicable to the present case. On the contrary, the special provisions as to injunctions in Sections 6 and 16 (and there are no others) and the provisions in Sections 8, 9, 10 (at end) as to actions for damages, and the special provisions for *mandamus* in Section 6, and the new section in the Act of March 2, 1889, exclude the jurisdiction in equity over a bill like the present, where the Commission has not acted.

The leading case in this country on the subject of equity jurisdiction over violations by corporations of public duties, especially when made indictable, is that of the *Attorney-General vs. Utica Insurance Company*, 2 Johnson's Chancery Rep., 371, which was decided by Chancellor Kent; the Attorney-General of the State of New York, instead of going into a court of law, went into a court of equity. An information was filed by

the Attorney-General, *ex officio*, charging the insurance company with being engaged in banking operations without any authority under the act incorporating them, and in violation of the prohibition in the act, to restrain incorporated banking associations. The information concluded not only with the usual prayer for process of subpœna, but for injunction to restrain the company from the business incident to incorporated banks.

The head-note expresses clearly Chancellor KENT'S views and decision together with a few extracts from the opinion:

Head-note.—"This Court has no jurisdiction over offenses against a public statute, or to restrain persons from carrying on the business of banking, in violation of the act passed the 6th of April, 1813, to restrain unincorporated banking associations; and a motion made by the Attorney-General, on an information filed by him *ex officio*, for an injunction for that purpose, was refused."

The case is stated in the first paragraph of the Chancellor's opinion:

"An information is filed by the Attorney-General, *ex officio*, against the defendant, charging it with engaging in banking operations without any authority under the act incorporating it, and in violation of the prohibition in the act to restrain unincorporated banking associations. The information concludes, not only with the usual prayer for process for subpœna, *but for an injunction to restrain the company from business incident to incorporated banks.* * * *

"The charge contained in the information savors, then, so much of a criminal offense that it would require a clear and settled practice to justify the interference of this Court, *when that interference is not called for in aid of a prosecution at law.* The charge

of the usurpation of a franchise has so frequently occurred, and the remedy by injunction is so convenient and summary that the jurisdiction of this Court would have been placed beyond all possibility of doubt and have been distinctly announced by a series of precedents if any such general jurisdiction existed. But I have searched in vain for this authentic evidence of such a power. The precedents are all in the Court of K. B., and Kyd cites nearly a hundred instances within the last century of informations filed in the K. B. to call in question the exercise of a franchise. * * *

"If a charge be of a criminal nature *or an offense against the public and does not touch the enjoyment of property*, it ought not to be brought within the direct jurisdiction of this Court, which was intended to deal only in matters of *civil right, resting in equity, or where the remedy at law was not sufficiently adequate.* * * *

"The plain state of the case, then, is that an information is here filed by the Attorney-General to redress and restrain by injunction the usurpation of a franchise, which, if true, amounts to a breach of law and of public policy. I may venture to say that such a prosecution is without precedent in this court, but it is supported by a thousand precedents in the courts of law. How, then, can I hesitate on the question of jurisdiction?

"The whole question upon the merits is one of law and not of equity. The charge is too much in the nature of a misdemeanor to belong to this court. The process of injunction is too peremptory and powerful in its effects to be used in such a case as this without the clearest sanction. I shall better consult the stability and utility of the powers of this Court by not stretching them beyond the limits prescribed by the precedents. Without, therefore, giving any opinion on the question whether the Utica Insurance Company are entitled to exercise banking powers, I am of opinion that I have no jurisdiction in the case before me and that the motion for the injunction must be denied."

" Application for the injunction is not because it is intended to be merely auxiliary to a proceeding at law. The entire and final remedy is sought in this Court. It is equally a question of law whether they were within the provisions of the restraining act. * * * It appears not to admit of doubt, nor do I understand it to be disputed, that if the defendants as a corporation have assumed powers not within their charter, the people of this State by their Attorney-General have a complete and adequate remedy at law. * * * I may venture to say that such a prosecution is without precedent in this Court, but it is supported by a thousand precedents in the courts of law. The whole question upon the merits is one of law and not of equity."

See, also, case of People vs. Same *(quo warranto)*, 15 Johns., 358, s. p.; Comwlth. vs. Bank, 28 Pa., 389 *(quo warranto)*; *Id.* (same matter of equity), p. 379.

In the brief on the other side much reliance seems to be placed upon the case of the *Attorney-General vs. Railroad Companies* (35 Wis., 425, 1874). The Supreme Court of Wisconsin in this case, on the special State legislation there in question, sustained the information in equity originally filed in the Supreme Court of the State by the Attorney-General of the State, acting for the State, praying for writs of injunction to restrain the defendant railroad companies from exacting tolls for the carriage of passengers and freight in excess of the rates prescribed by the said Act of 1874. Some general views of the Court are not entirely reconcilable with the decision of Chancellor KENT in the case of the *Attorney-General vs. the Utica Insurance Company, supra*, concerning which RYAN, J., said, " in that case

a very narrow and limited view of the jurisdiction of courts of equity was taken." At all events, the question of equity jurisdiction presented in the case at bar is not covered by the Wisconsin case, as will appear from the eighth paragraph of headnotes of that case, which is as follows:

"8. It seems that the rule that equitable proceedings will not lie to enforce a statute which provides penalties for all violations thereof is not applicable to an information of the Attorney-General to restrain the violation of public right by a corporation. *But it was not necessary to decide that question here.*"

Inasmuch as Section 10 of the Interstate Commerce Act makes the railway corporation itself indictable, and provides penalties for all violations thereof, not only against the agents and officers of the corporation, but the *corporation itself*, we have here in the case at bar the very question which the Supreme Court of Wisconsin said in that case it was not necessary to decide.

Moreover and conclusively, the *Wisconsin case* is not applicable, because there was not under the Wisconsin legislation a commission with powers and duties like those enjoined by the Act to Regulate Commerce on the Interstate Commerce Commission, and no provisions such as those found sections, 13 to 16 in said Act inconsistent with the right to bring and maintain an original bill in equity.

The Supreme Court of the United States has always maintained the distinction between mandamus and relief in equity. Their respective functions are distinct.

Thus, mandamus and not a bill in equity lies to compel municipalities to levy taxes according to their contract duty.

Walkley vs. Muscatine, 19 Wall., 167.
Heine vs. Levee Commrs., 19 Wall., 655.
Barkley vs. Levee Commrs., 93 U. S., 258.
Thompson vs. Allen County, 115 U. S., 550.
Rosenbaum vs. Bauer, 120 U. S., 450.
Smith vs. Bourbon County, 127 U. S., 105.
Butterworth vs. United States, 112 U. S., 50.

Remedy to compel performance of public duty by corporations is by mandamus and not in equity. The principle is elementary. It is indeed fundamental. To those who recall the nature and extent of the superintending jurisdiction of the Queen's Bench over all public bodies and corporations, exercised largely by mandamus, and in connection with this the historical development of equity as a supplement to and aid to law where the legal remedies were inadequate, the principle is extremely clear.

Re Sawyer, 124 U. S., 200, where the general subject is fully considered.
Hannewinkle vs. Georgetown, 15 Wall., 547.
Dows vs. Chicago, 11 Wall., 108.
Many cases, Federal and State, are cited in Dillon, Munic. Corp. (4th Ed.), Secs. 826, 906-908.

In the *Federal Courts*, by express Act of Congress, there can be no case of equitable cognizance where there is a plain and adequate remedy at law (see cases last cited, and also Ewing vs. St. Louis, 5 Wall., 413).

The said Act of Congress provides that "suits in equity shall not be sustained in either of the Courts of the United States in any case where a plain, adequate

and complete remedy may be had at law" (Rev. Stats., Section 723).

The duties in question in the present cause are public duties *simpliciter* and strictly. They do not relate to property or private property rights, and therefore are not within the class of subjects to which the jurisdiction of equity extends, for in the language of Mr. Justice GRAY (*Re* Sawyer, 124 U. S., p. 210), **"the office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of rights of property."**

That the remedy in this case by mandamus is adequate is demonstrable by a very short statement, to wit:

If the facts stated in the amended bill of complaint in this case had been stated in an information by the United States on the relation of the Interstate Commerce Commission, or on the relation of the City of Wichita, or on the relation of the District Attorney or the Attorney-General of the United States, asking for a mandamus commanding the defendant to do what is sought by this bill in equity, to wit: to "collect no greater compensation for the shipment of live stock and for the shipment of the various classifications of freight between the City of Wichita and the City of St. Louis, than the defendant at the same time charges and received for shipments of live stock and freight of the same classifications between the cities of Omaha and St. Louis," etc., etc. (Record, p. 59), precisely the same result

would have been obtained as is sought by the bill in equity. This being so, it is clear that the remedy by mandamus is, as applied to the case stated in the bill, is just as complete, just as adequate; in fact, precisely identical and coincident with the relief sought in the bill in equity, and therefore a court of equity has no jurisdiction. Why? Because the remedy at law is adequate, and, therefore, that remedy must be resorted to since it gives the defendant the benefit of a trial by jury, to which it is entitled under the seventh amendment of the Constitution, which benefit the defendant is deprived of if an original bill in equity like the present will lie.

Moreover, if the remedy by mandamus is adequate (as it is above shown to be), then the Act of Congress above quoted expressly forbids the maintenance of a suit in equity in the Courts of the United States.

Our point is that if in a case of alleged discrimination between *localities* a prior investigation by the Commission is not in all cases necessary, then the remedy by *mandamus* is adequate and an independent suit in equity will not lie.

Argument on Want of Equity Jurisdiction of the Present Bill Summarized.

It is clear that without the Interstate Commerce Act or some other statue of Congress, a bill in equity in the Federal Courts of the United States would not lie for discrimination in rates either between private shippers or between localities, and incontestably not for discrimination between *localities*, which is all that is material in the present cause. And the reason

is plain—namely, because the whole power of Congress over the subject of railway regulation rests on the power given in the Constitution to regulate interstate commerce, and until Congress acts and prohibits such discrimination, no remedy therefor exists in law or in equity; and, therefore, such discriminations, in the absence of such statute, would be irremediable either at law or in equity. The Interstate Commerce Act prohibits unjust discrimination between localities—a new right created by the act. It creates a commission for the purpose of examining into alleged violations of the Act, and makes it the duty of the Commission, at its own instance, or at the instance of "persons," "firms," "corporations" or "localities," to make such examinations. The questions involved in such investigations have been recently declared by one of the Interstate Commerce Commissioners to be "traffic questions, for the most part requiring for their understanding and determination expert knowledge in a high degree. This knowledge the Federal Judges do not possess in any degree. The time of the Courts is fully occupied with other matters." It was because of these and like considerations that Congress created the Interstate Commerce Commission as a special expert tribunal to hear and decide such questions, making provisions for a simple, inexpensive and speedy procedure.

The scheme of the Act is very plain as respects, rights and remedies. When a recognized cause of action at law exists an ordinary action at law may be brought for damages. The Act invests the Federal Courts with juridiction to hear and determine such actions. The Act alsospecifies the instances in which *mandamus* may be used; and it also specifies the in-

stances in which injunctions may be sought. It covers the whole circle of remedies civil and criminal. Note, however, that the Act nowhere invests the Courts of equity with any general power or jurisdiction, and note that it confers no general equity jurisdiction on the Circuit Courts of the United States in cases arising under the Act. On the contrary, the enumeration in the Act of the specific instances in which injunctions may be issued excludes the idea of any general jurisdiction in equity.

Why are all these great and extensive powers conferred upon the Commission to investigate by special modes of procedure any and all violations of the Act? Why all these minute details as to the exercise of the power of investigation including for the purpose of taking testimony, the finding of fact, the mode of enforcement, if the Commission may at it pleasure decline to perform these duties, and turn the parties over to an ordinary suit in the Courts? If Congress meant that the courts should have original and independent jurisdiction concurrent with the commission over all violations of the Act why did it not so provide?

The Act had been in force thirteen years when the present suit was brought, and it is admitted that it is the pioneer suit of the kind, thus showing the concensus of opinion that for complaints of the character set forth in the present bill, the parties complaining must submit them in the first instance to the Commission whose decision the act provides may be enforced in the judicial tribunals by injunction. What is gained by going into a Court of equity in the first instance, as the Court will have to appoint a Master, probably a single Master, to make the same investigation which the Act contemplates shall be made by the Interstate

Commerce Commission, whose numbers, duties and experience are supposed to render them peculiarly competent to make it, and to make it speedily. This suit it therefore revolutionary of all previous notions and practice and of all just and sound legal principles, and, is in contravention of the purpose which led to the creation of the Interstate Commerce Commission.

We contend, for the reasons above given, that aside from the Interstate Commerce Act, an independent suit in equity of this nature could not be maintained. The whole power of the Commission and the whole power of the Courts rest after all solely on the constitutional "power of Congress to regulate commerce among the several States." Congress has exercised its power in the Interstate Commerce Act. That Act covers both rights and remedies, and it sets out in its various provisions when the remedy may be by *action at law for damages* (Sections 8, 9 and 10); when by *mandamus* (Section 6, and the Amendatory Act of March 2, 1889); when by *injunction* (Sections 6 and 18); and when by *criminal* proceedings (Section 10). And inasmuch as the Act gives no right to the United States or to others to sue in equity, the act by specifically providing what remedies may be employed, excludes the right (if it would otherwise exist) to bring a suit in equity by original bill.

The foregoing views answer two points made by the other side, namely, Point IV. (page 31), that "*even if the Commission has original jurisdiction over complaints made by individual, the rule does not apply to the Government;*" and Point VIII. (page 45), "*Equity is equal to every emergency.*"

We deny that the Government has any special prerogatives. If the suit is one falling within the Seventh Amendment (which was intended to protect the citizen against the Government), the Government cannot elect to bring a suit legal in its nature in an equity court, and thus deprive the adverse party of the right of a trial by jury. The same is true of the above quoted Act of Congress going back to the Judiciary Act, which prohibits equity from entertaining any suit in any case where there is a plain, adequate and complete remedy at law. On the contrary the established doctrine is that when the Government goes into Court as a suitor, it is bound by the same rules and principles as private parties. So far from equity being an unbounded ocean of jurisdiction, the settled doctrine is that every case in equity must be brought within some "recognized head of equity jurisdiction," and the present bill falls within no recognized head of equity jurisdiction.

It thus appears that there are two insuperable barriers to the maintenance of the present bill:

1st. It is not within the general jurisdiction of a court of equity and no jurisdiction in equity has been conferred by Congress. On the contrary such jurisdiction is negatived by the specific remedies provided by the Act, which remedies exclude the remedy by injunction in this class of cases if it would otherwise exist.

2d. The remedy by mandamus is adequate to redress the particular grievance alleged in the bill; it is the remedy prescribed in the Act in like cases; and therefore under the general doctrine of equity jurisdiction, and under the seventh amendment to the Constitution, and under the Act of

Congress aforesaid (Rev. Stat. Sec. 723, *supra*) this bill in equity cannot be sustained.

These considerations seem to us to be conclusive against the present bill.

We observe that the other side refers to the decision of this Court *in re Debs, 158 U. S.* It is not in point. There the United States mails were actually obstructed, and the specific functions of the general government were interfered with by force and violence, interstate commerce was suspended, great destruction of property was threatened, and a grave crisis resulting in direct and irreparable injury to the United States and its property as well as to public and private property, not capable of awaiting the ordinary process of the law, was impending. That decision stands and is supportable on these special grounds, and can only be justified by them. No such grounds exist in the present case.

V.

THE INTERSTATE COMMERCE ACT AS CONSTRUED BY THE COURTS, HAVING CONFERRED UPON CARRIERS THE SOLE POWER OF MAKING RATES, IN THE ABSENCE OF ANY PROVISIONS BY CONGRESS FIXING INTERSTATE RATES, AND IT HAVING MADE THE DUTY OF THE CARRIERS IN MAKING SUCH RATES TO TAKE INTO CONSIDERATION ALL OF THE CIRCUMSTANCES AND CONDITIONS, SIMILAR AND DISSIMILAR, THE SCHEDULE OR SCHEDULES SO MADE ARE PRESUMPTIVELY LAWFUL, AND

THE NAKED ALLEGATION AND CHARGE IN THE BILL THAT SUCH RATES ARE UNREASONABLE AND DISCRIMINATIVE, OR THAT THERE IS AN UNDUE PREJUDICE UNDER SIMILAR CIRCUMSTANCES AND CONDITIONS, IS NCT SUFFICIENT EITHER TO CONSTITUTE A CAUSE OF ACTION OR TO GIVE THE CIRCUIT COURT JURISDICTION IN EQUITY TO ORIGINALLY HEAR AND DETERMINE THE VALIDITY OF THE RATES THUS FIXED.

In *Texas & Pacific Ry. Co. vs. I. C. C.*, 162 U. S., 197, which arose out of a suit upon complaint by the Commission in the Circuit of the United States for the Southern District of New York against defendant company for certain discriminations charged therein, and in which the company alleged that the bill failed to allege or show any facts constituting a violation by defendant of the order of the Commission, but the Court entered a decree enjoining defendant from further continuing such disobedience of the order, and which was subsequently appealed to the United States Circuit Court of Appeals, Second Circuit, and thence appealed to the Supreme Court of the United States, this Court, after stating that the commission under the act which covered the whole field of interstate commerce, established a tribunal to enforce its provisions of covering the entire service to be performed by carriers, said :

" The very terms of the statute that charges must be reasonable, that discrimination must not be unjust, and that preference or advantage to any particular person, firm, corporation or locality, must not be undue or unreasonable, necessarily imply that strict uniformity is not to be enforced ; but that all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies, and of the producers, shippers and consumers, should be con-

sidered by a tribunal appointed to carry into effect and enforce the provisions of the Act."

"The principal purposes of the SECOND SECTION is to prevent unjust discrimination between shippers. It implies that, in deciding whether differences in charges, in different cases were or were not unjust, there must be a consideration of the several questions whether the services rendered were 'like and contemporaneous,' whether the kinds of traffic were 'like,' whether the transportation was effected under 'substantially similar circumstances and conditions. To answer such questions, in any case coming before the Commission, requires an investigation into the facts; and we think that Congress must have intended *that whatever would be regarded by common carriers*, apart from the operation of the statute, as matters which warranted differences in charges, ought to be considered in forming a judgment whether such differences were or were not 'unjust.' Some charges might be unjust to shippers—others might be unjust to the carriers. The rights and interests of both must, under the terms of the Act, be regarded."

"THE THIRD SECTION forbids any undue or unreasonable preference or advantage in favor of any person, company, firm, etc., and as there is nothing in the Act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions, not of law, but of fact. The mere circumstance that there is, in a given case, a preference or an advantage does not of itself show that such preference or advantage is undue or unreasonable within the meaning of the Act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its

judgment whether such preference or advantage is undue or unreasonable. . When the section says that no locality shall be subjected to any undue or unreasonable prejudice or disadvantage in any respect whatsoever, it does not mean that the Commission is to regard only the welfare of the locality or community where the traffic originates, or where the goods are shipped on the cars. The welfare of the locality to which the goods are sent is also, under the terms and spirit of the Act, to enter into the question."

It logically follows from this reasoning that *facts* and not conclusions must be pleaded clearly showing not only a right to *a* remedy, but a right to *the* remedy sought here.

So in *I. C. C. vs. Ala. M. R. Co.*, 168 U. S., 144, this Court, after discussing the duties and powers of the Commission in deciding cases regulating and executing the Interstate Commerce Act, and after recognizing the procedure for which we have contended, says (referring to the former decisions of the Supreme Court in the case of:

C. N. O. & T. P. R. Co. vs. I. C. C., 162 U. 184–197, and

T. & P. R. vs. I. C. C., 162 U. S. 197-255),

that:

"The Circuit Court, after a consideration of the evidence expressed its conclusion thus:

"'The act to regulate commerce leaves common carriers as they were at the common law, free to make special rates looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits. The carriers are better qualified

to adjust such matters than any Court or board of public administration, and, within the limitations suggested, it is safe and wise to leave to their traffic managers the adjusting of dissimilar circumstances and conditions to their business.'"

And further this Court says that:

"The last sentence in this extract is objected to by the commission as declaring that the determination of the extent to which discrimination is justified by circumstances and conditions should be left to the carriers. We understand the statement, read in the connection in which it occurs, to mean only that, when once a substantial dissimilarity of circumstances and conditions has been made to appear, the carriers are, from the nature of the question, better fitted to adjust their rates to suit such dissimilarity of circumstances and conditions than courts or commissions; and when we consider the difficulty, the practical impossibility, of a court or a commission taking into view the various and continually changing facts that bear upon the question, and intelligently regulationg rates and charges accordingly, the observation objected to is manifestly just. But it does not mean that the action of the carriers, in fixing and adjusting the rates, in such instances, is not subject to revision by the commission and the courts."

The Court further says, in answer to the contention on the part of the railroad companies that it has no jurisdiction to review the judgment of the Commission upon these questions that:

"We think this contention is sufficiently answered by simply referring to those portions of the Act which provide that, *when the court is invoked by the Commission to enforce its lawful orders or requirements*, the court shall proceed, as a court of equity, to hear and determine the matter and in such manner as to do justice in the premises."

This decision, or rather these decisions, and a number of other comparatively recent decisions which we might cite, finally crystalize the opinions of the Supreme Court of the United States in the proposition that the carriers are authorized and required by the sixth section of the act, as we shall presently see, to make the schedules and the rates which are final until some rate-making power (and which is the Congress) makes a different rate.

And in making such schedule the carriers are empowered and authorized to take into consideration the various circumstances and conditions surrounding the particular shipment—(1) the necessities of the carrier itself to make a rate in order to get the business; (2) the interest of the shipper; (3) the interests of the person to whom the shipment was made; (4) the interest of the respective municipalities and localities, if municipalities and localities are interested in the shipment; (5) the cost of the relative shipments; (6) competition; (7) volume of business; in fact every conceivable thing which influences a business man or a carrier in determining what the rate should be.

The Court says in the cases cited that the carrier has the right to judge of the "limiting circumstances" and conditions that surround the shipment and that "the carriers are left to manage their own business in their own way, and are better qualified to adjust such matters than any board of public administration;" and that "it is safe and wise to leave to their traffic managers the adjusting of the dissimilar circumstances and conditions."

See, also, *I. C. C. vs. Ala. C. M. R. Co.*, 21 C. C. A., 51; 74 Fed. Rep., 715.

And in the case of *I. C. C. vs. C. N. O. & T. P. R. Co.*, 167 U. S., 480, it is said:

"§ 6 provides that if any common carrier fails or neglects or refuses to file or publish its schedules as provided in the section, it may be subject to a writ of mandamus issued in the name of the people of the United States at the relation of the Commission. * * * Not only is it thus plainly stated that the rates are those which the carrier shall establish, but the prohibitions upon change are limited in the case of an advance by ten days' public notice, and on reduction by three days. Nothing is said about the concurrence or approval of the Commission, but they are to be made at the will of the carrier. Not only are there these provisions in reference to the traffic upon its own line; but further when two carriers shall unite in a joint tariff, (and such union is nowhere made obligatory but is simply permissive), the requirement is only that such joint tariff shall be filed with the Commission and nothing but the kind and extent of publication thereof is left to the discretion of the Commission."

"It will be perceived that the section contemplates a change in rates either by increase or reduction, and provides the conditions therefor. * * * The fact that the carrier is given the power to establish in the first instance, and the right to change, and the conditions of such change specified, is irresistible evidence that this action on the part of the carrier is not subordinate to and dependent upon the judgment of the Commission. * * * We have the clear language of § 6 recognizing the right of the carrier to establish rates, to increase or reduce them and prescribing the conditions upon which such increase or reduction may be made, and requiring, as the only conditions of its action, first, publication, and second, the filing of the tariff with the Commission."

We have quoted at length from the decisions of this Court for the purpose of showing that the carrier has

the power under § 6 to make and publish the rate, and that this power is final until some higher power changes the rate. We have already seen from the other decisions cited above that the Commission has no power to change the rate. It has been repeatedly decided that the Courts have no power to fix a future rate. Any given rate, therefore, fixed by a public carrier on its line or lines is *prima facie* a legal, lawful and just rate. We have seen that before even the Commission can question these rates or present the question as to their reasonableness to the courts, it must, in the mode provided by the Act, find *the substantive facts showing* an unjust charge or discrimination or preference. The presumptions are that the carrier, being empowered to fix rates, has fixed lawful rates, as we have seen; questions of dissimilarity and conditions and preferences and of reasonableness of charge are questions of fact; wherefore, under these authorities *affirmative* proof must be adduced before the proper tribunal to show an unreasonable charge or discrimination or preference, and that too, after the carrier has considered all the rights, interests and conditions of all the various parties, municipalities or places.

Our contention therefore is that a bill such as the present (if otherwise maintainable, which we deny), to be good and sufficient must charge and specify *the facts which show* that the rates in force and published as provided by law, and which cannot be either increased or decreased except upon notice, are unlawful; that the naked averments, as in the bill here, that the charge is unreasonable, the discrimination and undue preference unjust and unreasonable, and that the conditions and circumstances are similar, are not sufficient. *Facts must be stated* to overcome the presump-

tion of their legality, and showing that they are in themselves unlawful.

We have seen that the Courts have uniformly held that there may be excessive charges that are not unreasonable; that there may be discriminations which are not unreasonable or unlawful; that there may be preferences which are not unjust or undue, wherefore it follows that the naked charge of either or all of these wrongs does not charge a cause of action, and it has been repeatedly held, that a comparison of rates between places and points in different States showing a difference does not show or prove anything. And as the interest of the shipper and the interest of the person to whom shipped, and locality which is to get the benefit of the shipment, as well as the carrier, are all to be considered, a bill to be good must make averments *of fact* which negative these conditions which presumptively justify the published rate or schedule.

We have also said under this proposition that the Courts have no original jurisdiction to hear and determine the validity of the schedule or rate in the first instance. According to all of these decisions, an investigation is a necessity, and this is supported with all reason, independent of the decisions. The Courts in these decisions, and in many others, have repeatedly decided that the Commission is the tribunal whose duty it is to ascertain the facts, and having ascertained them, make a report of the facts which show an unreasonable and unjust charge, discrimination and preference; and within these decisions it will be found that the Supreme Court has repeatedly held that findings of conclusions of facts against the carrier are not sufficient, but that the facts showing a just cause of complaint against them must be found and reported in

full. If this be required of the Commission as a mere *prima facie* statement of facts to be used in a case where the Court, according to these findings, may hear and determine the case *de novo*, but with the Commissions' findings as a basis, how much more requisite is it that a bill of complaint, on the part of the United States of America, shall state *facts* showing the offenses charged instead of conclusions of law. The averments of this bill are mere legal conclusions, and there is no more reason why conclusions in a bill of this character should be acceptable to the Court than a naked allegation of negligence in a personal injury case, or of fraud in a case where fraud is charged.

We insist that this Court has no jurisdiction to hear or determine any case except a prima facie case exhibited to it by a report of the Commission stating facts sufficient to constitute a suit, as in § 16 provided.

Moreover, we insist that the Circuit Court has no jurisdiction under the averments of this bill because there are no averments which show that the United States of America have any cause of interference or any rights, property or special interests at stake. The averments here are not averments in behalf of the public. They are averments in behalf a municicipality and its vicinity against a carrier, because of unlawful preferences in favor of *another* municipality. A municipality, a place (which is but another name for municipality), association, firm, corporation, company or person, are the only parties for whom relief is provided under this act.

We are not contending that there are not acts of

Congress under which suits might be brought by the United States of America upon averments showing infringements of the rights, property or interests of the United States, or upon averments bringing the case within some recognized head of equity jurisdiction, but what we claim is that this is not one of that class; that the Interstate Commerce Act has not extended but on the contrary has denied, the right or the remedy by injunction *to the United States for the specific matters charged in this bill.*

We claim further that this act guarantees to every person place or municipality authorized to bring a suit or action of any character an adequate remedy at law and fixes a penalty denounced by the act. The act as a whole is penal and denounces by pains and penalties, and should be construed against complainants by the "rule of strict proof," as laid down in:

Parsons vs. C. & N. W. R. Co., 167 U. S., 447.

In the above case this Court says that the Interstate Commerce act is a penal statute; that persons seeking to recover under such Act should not only be held to the rule of strict *proof* for that reason, but should also be held to the rule of strict averment of *fact;* that is, that there should be a particularity of averment and of the facts constituting the cause of the suit or action.

We further submit that the subject matter of equity jurisdiction being the protection of property and civil rights, courts of equity will not interfere for the prevention of a mere illegal act; and that equity will not restrain an act because it contravenes the general policy in the absence of a violation of a private right.

High on Injunctions (old ed.), §526.

We claim that the Interstate Commerce Act having made a special provision for relief which is just as adequate, and indeed in the very courts in which the Government is proceeding here, and just as speedy, and much more just to all parties, such interference by the Government as is here attempted is not justified. If the Government can intercede in the first instance upon the mere request of the Commission, it can intercede upon the mere request of an individual if he can make a showing of the protean charge of "a public wrong." The Interstate Commerce Commission, not having made any examination or findings, has no more right to make this request under this statute than an individual. It has a right, upon the prescribed conditions and by pursuing the prescribed course, to institute in its own name, Sec. 16 (not in that of the United States) a suit even for the purpose sought here, but it cannot evade the express command of the law that it shall first investigate, give "due notice" and "hearing" and "the opportunity to desist" (Sec. 15). The wisdom of the adoption of this course in every case, so far as we have been able to ascertain, has been demonstrated by observation and experience. The reports of the Commission show multitudes of cases thereby adjusted before they ever came to a suit. This observation is equally as applicable to municipalities, and places and localities as to persons (Sec. 13); and equally as practicable for them; indeed, there is every reason that the statutory course should be pursued instead of the novel procedure in this case. Unless this statutory course is thus pursued, the flood-gates of litigation in the Federal Courts will be thrown wide open, the Interstate Commerce Commission will shift

upon the Courts its responsibilities and its labors. It is not only a question of power and right upon the part of the Government, but a question of propriety and justice.

We submit that the demurrer to the bill ought to have been sustained. The decree should be reversed and cause remanded with directions to dismiss the bill *(see Stipulation, Record,* pp. 53, 54*)*.

JOHN F. DILLON,
J. H. RICHARDS,
C. E. BENTON,
B. P. WAGGENER,
Attorneys for Appellant.

ALEXANDER G. COCHRAN,
Of Counsel.

APPENDIX.

Opinion of Hook, J., Holding That an Original Bill in Equity Will Not Lie in the First Instance Where the Commission Has Not Acted, to Relieve Against Alleged Discriminatory Railroad Rates.

This opinion was delivered January 7, 1902, and is printed here for the convenience of the Court.

IN THE CIRCUIT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF KANSAS.

VANDERSLICE-LYNDS MERCANTILE COMPANY ET AL.,
Complainants,

vs.

MISSOURI PACIFIC RAILWAY COMPANY,
Defendant.

Opinion.

HOOK, J.: Three matters of importance requiring consideration are raised by defendants' plea to the jurisdiction and its demurrer to a portion of the bill.

[After disposing of the questions of jurisdiction and that no federal question appeared from the averments to the bill, which questions are not here material, the learned Judge proceeded as follows :]

" THIRD. The most serious contention is that raised by the demurrer, and it is whether or not a bill in equity will lie under the Interstate Commerce act to redress the grievances set forth in the bill of complaint without first submitting them to the Interstate Commerce Commission.

" It is contended by the defendant that the complaint should have been first submitted to the Commission and that a Federal court will not entertain a suit in equity in the first instance where the principal object sought is a correction of alleged discriminative rates. On behalf of the complainant it is contended, in order to sustain the jurisdiction of the court on the ground that a Federal question is involved, that the suit arises under the Interstate Commerce act, and in order to avoid the force of defendant's demurrer it is contended that the suit is maintainable in equity under general principles of law irrespective of the provisions of the Interstate Commerce act. That the contentions of complainants' counsel may be somewhat inconsistent is immaterial so far as concerns the question of jurisdiction for the reason that as already indicated jurisdiction is sustainable upon the ground of diverse citizenship.

" It is apparent however, from the face of the bill, that the complainants are seeking to enforce the provisions of the Interstate Commerce act. As complainants' counsel says in his brief " The Interstate Commerce act is made the basis of a charge in the bill against discrimination." SEC. 8 of the original act (24 Stat. 379) provides that any common carrier subject to the provisions of the act shall be liable to the person injured by a violation thereof for the full amount of damages sustained. SEC. 9 provides that any person damaged may either make complaint to the Interstate

Commerce Commission as provided for in the act or may bring suit for the recovery of damages in any district or circuit court of the United States of competent jurisdiction, but that he shall not have the right to pursue both of said remedies, and must in any case elect which one of the two methods of procedure he will adopt. SEC. 10 denounces a violation of the act of anyone subject to the provisions thereof as a misdemeanor and provides that the district courts of the United States shall have jurisdiction of such offenses. SEC. 10 creates the Interstate Commerce Commission and other sections define the powers and duties of the Commission. SEC. 14 provides that in every investigation made by the Commission a report in writing shall be made which shall include the findings of fact upon which the conclusions of the Commission are based, with its recommendations in respect thereof, and that "such findings so made shall thereafter in all judicial proceedings be deemed *prima facie* evidence as to each and every fact found."

SEC. 16 provides that whenever any common carrier subject to the provisions of the act shall violate or refuse or neglect to obey any lawful order or requirement of the Commission it shall be the duty of the Commission and also lawful for any company or person interested in the order or requirement, to apply in a summary way by petition to the Circuit Court of the United States sitting in equity in the proper judicial district. Power is given to the Circuit Court to thereupon hear and determine the matter as a court of equity and to do justice in the premises. Upon such hearing the report of the Commission is to be taken as *prima facie* evidence of the matters therein stated. The court has power in such proceeding to issue writs of injunction or other process enforcing obedience to lawful orders of the Commission. An appeal is provided from the decree of the Circuit Court direct to the Supreme court of the United States, but by subsequent legislation the appeal is now to the Circuit

Courts of Appeals in the first instance. SEC. 10 of the amendatory act of 1889 (25 Stat. 863) provides that the Circuit and District Courts of the United States shall have jurisdiction to issue writs of mandamus on the relation of any person to enforce the right of the relator to have interstate traffic moved by the common carrier at the same rates as are charged or upon terms or conditions as favorable as those given by the carrier to other shippers for like traffic under similar conditions. It is also provided that the writ of mandamus shall be cumulative and it will not be held to exclude or interfere with other remedies provided by the Interstate Commerce act.

SEC. 22 of the original act provides that nothing therein contained shall in any way abridge or alter the remedies existing at common law or by statute, but the provisions of the act are in addition to such remedies.

I am unable to discover that the Supreme Court of the United State has passed upon the question which is raised by the demurrer in this case. It has been the uniform practice for persons or corporations complaining of the violation by common carriers of the provisions of the Interstate Commerce act to first apply to he Commission for an order redressing the grievances complained of. After such orders have been made it has generally happened that the Commission itself instituted the proceedings in the Circuit Court for the enforcement thereof, although in some instances proceedings were instituted by the parties claiming to be injured and more directly in interest. In both classes of cases, however, the orders of the Commission were set forth and relied upon as *prima facie* evidence.

Now the complainants contend in the case in hand that they may ignore the Commission altogether and may bring a suit in equity in the Circuit Court and obtain full relief against discriminative rates, and require the Court to make an exhaustive and com-

prehensive inquiry into the whole subject of rates, the effect of competition of lines of transportation between Kansas City and St. Louis, similar and dissimilar conditions, and, in fact, do everything which the Interstate Commerce Commission was expressly created to do in the first instance as an aid and assistance to Courts in subsequent litigation. Some of the decisions of the Supreme Court of the United States throw light upon this question and indicate how the Commission is to be regarded in its relation to the Courts in matters in litigation similar to those involved in this suit. It should be first observed that when complaint is made to the Commission and it has investigated and made its report, and thereafter suit is instituted in the Circuit Court, that Court is not confined to the testimony elicited before the Commission but may try the matters in issue *de novo*. It is therefore inferable that if the Circuit Court has jurisdiction of a suit in equity such as the one in hand without regard to the Interstate Commerce Commission or the preferment of a complaint before it, the Circuit Court in a suit brought after the Commission has acted should, the bill of complaint being broad enough, proceed to final decree, although its conclusions might differ in substantial particulars from the findings of the Commission. In other words if the contention of complainant's counsel is correct, the findings of the Commissioners being merely *prima facie* evidence, the Circuit Court having secured jurisdiction of the particular cause and possessing, as complainants' counsel contends plenary jurisdiction as a court of equity under general principles of law irrespective of the provisions of the Interstate Commerce Act, should proceed to the ultimate determination of the rights of the parties without remanding or re-referring the case to the Interstate Commerce Commission. This, however, is not done.

Railway Company vs. Commission, 162 U. S., 196.

In this case the Supreme court in expressing disapproval of the method of railroad companies in withholding the larger part of their evidence from the Commission and first presenting it in the Circuit Court, said:

"The Commission is an administrative board and the courts are only resorted to when the Commission prefers to enforce the provisions of the statute by a direct proceeding in the court or when the orders of the Commission have been disregarded."

In this case the Circuit Court of Appeals examined the evidence adduced before the Commission and the evidence adduced before the Circuit Court and proceeded to an original investigation of the testimony and determined the facts established thereby. The Supreme Court said that the Circuit Court of Appeals should have reversed the decree of the Circuit Court, set aside the order and remanded the cause to the Commission, in order that it might if it saw fit, proceed therein according to law. It was also said that " the defendant was entitled to have its defense considered in the first instance at least by the Commission upon a full consideration of all the circumstances and conditions upon which a legitimate order can be founded * * * and it did not comport with the true scheme of the statute that the Circuit Court of Appeals should undertake of its own motion to find pass upon such questions of fact in a case in the position in which the present one was."

L. & N. Railroad Co. v. Behlmer, 175 U. S., 648:

In this case Behlmer, who was a wholesale dealer in hay and grain, began proceedings before the Interstate Commerce Commission complaining of discriminative rates. Testimony having been taken and a hearing had, the Commission made an order requiring the Railroad Company to desist from making certain charges. The order not having been obeyed, Behlmer filed his complaint in the Circuit Court of the United

States for the Eastern District of South Carolina. By stipulation the testimony taken before the Commission was used at the hearing in the Circuit Court and in addition thereto certain documentary evidence was received. The Circuit Court entered a decree that Behlmer's bill be dismissed. From this decree an appeal was taken to the Circuit Court of Appeals for the fourth circuit and that court reversed the decree of the Circuit Court and remanded the cause with instructions to render a decree substantially in accordance with the order made by the Commission. The cause was then taken to the Supreme court of the United States. The Supreme Court reversed the decree of the Circuit Court of Appeals and ordered that the case be remanded to the Circuit Court with instructions to modify its decree by providing that the dismissal be without prejudice to the right of the Commission to proceed, upon the evidence already introduced before it or upon such evidence and any additional evidence which it might allow to be introduced, to hear and determine the matter in conformity to law. In other words, the cause was not remanded to the Circuit Court with instructions to hear and determine the cause as a court of equity having plenary jurisdiction of the matters in controversy.

The same rule was adhered to in *Interstate Commerce Commission v. Steamship Company*, 181 U. S. 29. In this case the Supreme Court declined to enter into an original investigation of the evidence adduced but held that it was the duty of the court to correct the error of law committed by the commission and having done so it modified the decree of the Circuit Court of Appeals and of the Circuit Court by providing that the dismissal, of the bills should be without prejudice to the right of the Commission to make an additional investigation of the questions contained in the record pertinent to the complainants presented to that body.

Railway Company vs. Commission, 181 U. S. I.

In this case the decree of the Circuit Court of Appeals of the sixth circuit was reversed and the case was remanded to the Circuit Court with instructions to set aside its decree adjudging that the order of the Commission be enforced and to dismiss the application of the Commission without prejudice to its right to proceed, upon the evidence already introduced or upon such further pleadings and evidence as it might allow to be made or introduced, to hear and determine the matter in controversy according to law. The Supreme court declined to go into the whole evidence in order to determine the questions presented, nor did it in remanding the cause authorize the Circuit Court to do so. The Supreme Court said that the Commission "from the nature of its organization and the duties imposed upon it by statute is peculiarly competent to pass upon questions of fact of the character here arising."

Southern Pacific Co. v. Colorado Fuel & Iron Co. 101 Fed. 783.

The opinion of the Circuit Court of Appeals was delivered by Judge THAYER. The injunction of the lower court based upon the action of the Interstate Commerce Commission contained three clauses. The first and third clauses were held to be beyond the power of the Commission and of the Circuit Court for the reason that an attempt was made to prescribe a schedule of maximum rates, the Supreme court of the United States having determined that the Interstate Commerce Commission had no such power. By the second clause of the order of the Circuit Court the defendants were restrained in general terms from demanding 'unreasonable rates and from giving undue and unreasonable preferences to persons or localities or from subjecting the complainant to an unreasonable disadvantage etc. Judge THAYER said that this clause might possibly be upheld but that it was not apparent that any special advantage would result to the complainant from an order

couched in such general terms but which merely repeats the general admonitions of the Interstate Commerce Act. It is noteworthy that instead of so remanding the cause that the indefinite character of the second clause might be corrected by the Circuit Court the case was remanded with directions to dismiss the bill of complaint. Judge THAYER also said *that no reason was perceived why the remedy at law for the threatened wrong should be pronounced ineffectual or inadequate.*

He said:

"The damages that the complainant will sustain if it is right in its contention as to the unreasonableness of the proposed rates can be ascertained by a court and jury, while it is not suggested that the defendant Company is insolvent, or that it will be unable to respond for such damages as a jury may assess. Besides, a single verdict before a jury establishing the unreasonableness or discriminating character of the proposed rate would probably lead to a withdrawal of the rate, and avoid the necessity for further actions."

Doubtless there are cases which fall within the provisions of the Interstate Commerce act but of which the jurisdiction of the Circuit Courts as courts of equity is not referable alone to the terms of the act, but arises independently of the act from general principles of equity jurisprudence.

In my opinion the case at bar as shown by the averments of the bill and the nature and scope of the remedy is not of that class.

The bill will therefore be dismissed without prejudice to actions at law or proceedings before the Interstate Commerce Commission as complainants may elect.

WILLIAM C. HOOK,
Judge."

January 7, 1902.

UNITED STATES OF AMERICA, }
District of Kansas, } ss. :

I, GEO. F. SHARITT, Clerk of the Circuit Court of the United States of America, for the District of Kansas, do hereby certify the foregoing to be a true, full and correct copy of the Opinion in the suit of Vanderslice-Lynds Mercantile Co. *et al.*, vs. Missouri Pacific Railway Co. Case No. 7809 in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said
[SEAL.] Court at my office in Topeka, in said District of Kansas, this 8th day of August, A. D. 1902.

GEO. H. SHARITT,
Clerk.

No. 108.

DEC 2 1902
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the
By. & Attorneys & Perry &
& Opp
Filed Dec. 1, 1902.

THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee,

No. 1

BRIEF FOR APPELLEE.

W. C. PERRY,
Solicitor for Appellee.

JAMES M. BECK,
Assistant Attorney General,
Of Counsel.

The Linotype Ptg. Co., Kansas City, Mo.



In the Supreme Court of the United States

THE MISSOURI PACIFIC RAILWAY COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA,
Appellee.

No. 108.

STATEMENT.

The original bill was filed by the District Attorney for Kansas on July 26, 1893. (pp. 2-6.)

On January 11, 1894, the defendant demurred to the bill (pp. 9-10) and on September 14, 1894, (p. 18) the court overruled the demurrer. The opinion is reported in 65 Fed. Rep., p. 903, and is printed in the record. (pp. 11-18.)

Afterwards the defendant answered (pp. 18-27); the complainant filed certain exceptions to the answer (pp. 27-29). These exceptions were sustained (p. 31); see memoranda opinion, (pp. 32-33.) The defendant filed an amended answer (pp.33-52), and by the usual replication issue was joined. (pp. 52-53.)

It being manifest that a great volume of testimony would have to be taken, and as the defendant had raised the serious question whether the United States could maintain the suit, or had the right, in its own name, and without a preliminary hearing before the interstate commerce commission, to enforce, by injunction, the provisions of the interstate commerce act which forbid discrimination, it was thought best to finally settle that question. Therefore, the stipulation on pages 53-54 was entered into. That stipulation provides for the filing of an amended bill, the levelling of a demurrer thereat, and an appeal or appeals to the United States circuit court of appeals and to this court. The amended bill was filed (pp. 55-60); the defendant demurred (p. 61); the court overruled the demurrer and the defendant, electing to stand on its demurrer, final decree was entered in favor of the complainant. (pp. 62-73.)

The substance of the amended bill is as follows:

"That this suit is brought by the authority of and under the direction of the Attorney General of the United States, which said authority and direction is given under and in pursuance of a request of the interstate commerce commission of the United States that the United States Attorney for the District of Kansas be authorized and directed to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the interstate commerce law against the defendant in relation to the matters herein complained of."

The defendant, a railroad corporation, is a common carrier of all kinds of interstate freight between St. Louis, Missouri, and Omaha, Nebraska, and St. Louis, Missouri, and Wichita, Kansas, and between all points intermediate and beyond said cities of St. Louis, Omaha and Wichita on the line of defendant's road. That all such freight shipped over defendant's line between St. Louis to either Omaha or Wichita passes over the same track as far as Holden, Mo., a distance of 232 miles. From Holden the defendant has two lines—one of which runs in a

northwesterly direction to Omaha, the other in a southwesterly direction to Wichita. The distance from St. Louis to Omaha is 501 miles; from St. Louis to Wichita it is 458 miles. The freight traffic between St. Louis and Wichita over defendant's road is very large. St. Louis is a general distributing point, furnishes an extensive market for all kinds of traffic originating at and near Wichita, and but for the discrimination complained of there would be a largely increased business, and a more profitable trade carried on between the merchants of St. Louis and the people of Wichita and vicinage. That the defendant's road between St. Louis and Wichita, with its connections south and west, is one of the main thoroughfares for the freight traffic between the Mississippi river and the Pacific ocean and Gulf of Mexico. That the defendant has maintained and still maintains rules and regulations governing the freight traffic over its road between St. Louis and Wichita that unjustly and unreasonably discriminate against Wichita and in favor of Omaha, and against persons shipping freight and property between Wichita and St. Louis, and in favor of persons shipping freight between Omaha and St. Louis, and subject the locality in, about and tributary to Wichita, and the persons living therein, to an undue and unreasonable prejudice and disadvantage, by reason of the fact that the charges for freight service between St. Louis and Wichita are largely in excess of the charges made for like and contemporaneous service for the transportation of property between Omaha and St. Louis. That the service is rendered under substantially similar circumstances and conditions, and that said rates and charges collected and received by defendant for the shipment of freight between Wichita and St. Louis are unreasonable, excessive, exorbitant and unjust. That the rate of defendant on live cattle between Omaha and St. Louis is 17 1-4 cents per hundred weight, and on hogs 20 cents per hundred weight,

while the rate between Wichita and St. Louis is 28 3-4 cents per hundred weight on cattle, and on hogs 35 cents per hundred weight. That the rates charged by defendant between Omaha and St. Louis on other freight are as follows:

First class freight, 55 cents per cwt.
Second class freight, 40 cents per cwt.
Third class freight, 32 cents per cwt.
Fourth class freight, 25 cents per cwt.
Fifth class freight, 20 cents per cwt.
Class A, 22 1-2 cents per cwt.
Class B, 17 1-2 cents per cwt.
Class C, 15 cents per cwt.
Class D, 12 1-2 cents per cwt.
Class E, 11 cents per cwt.

That the rates between Wichita and St. Louis on the same classifications of freight are as follows:

First class freight, 115 cents per cwt.
Second class freight, 93 cents per cwt.
Third class freight, 78 cents per cwt.
Fourth class freight, 62 1-2 cents per cwt.
Fifth class freight, 53 cents per cwt.
Class A, 52 cents per cwt.
Class B, 39 1-2 cents per cwt.
Class C, 33 cents per cwt.
Class D, 27 cents per cwt.
Class E, 11 cents per cwt.

That said rates and charges constitute an unjust and unreasonable discrimination against persons shipping freight between Wichita and St. Louis and subject such persons, and the localities from which they ship, to an unjust and unreasonable prejudice and disadvantage, to the great hindrance and detriment of trade and commerce between St. Louis and Wichita, and the localities tributary thereto, and to the irreparable injury of the persons shipping from said points, and to the people of the United States.

It is then charged that any rates of freight between Wichita and St. Louis that exceed the rates charged for the same service between Omaha and St. Louis are excessive and ex-

orbitant "in and of themselves," and constitute an unreasonable discrimination against Wichita and the locality tributary thereto and the people living therein, and against persons shipping freight between the cities of Wichita and St. Louis, and subject such persons and localities to an unjust and unreasonable prejudice and disadvantage.

The demurrer to the amended bill is as follows:

"I. That it appeareth by the complainant's own showing by the said amended bill, that they are not entitled to the relief prayed by the amended bill against this defendant.

II. That the said amended bill is exhibited against this defendant for several and distinct and independent matters and causes which have no relation to each other, and in which, or in the greater part of which, this defendant is in no way interested or concerned, and ought not to be implicated.

III. That this defendant is not answerable to said complainants, but to some other persons, whose names it cannot state.

IV. That the said amended bill does not embrace the whole matter concerning which the suit is brought; wherefore this defendant may be harassed with other suits and a multiplicity of suits may ensue.

V. That it appears by the said amended bill that there are divers other persons who are necessary parties to the said bill, but who are not made parties thereto.

VI. That it appears by the said amended bill that the case of the said complainants is barred by the statute of limitations." (p. 61.)

POSITION OF THE APPELLANT.

In the lower courts the appellant, as we understand its position, insisted that the demurrer should have been sustained for the following reasons:

First. Because the amended bill does not contain any matter of equity whereon the complainant is entitled to any relief.

Second. Because complainant, under the interstate commerce act, has no authority to maintain this suit; that in any event the circuit court had no original jurisdiction of the suit; and that, even if the averments in the bill would otherwise entitle complainant to the relief prayed for, the grievances complained of must first be submitted to the interstate commerce commission and passed on by that body before the circuit court could entertain jurisdiction.

Third. Because the amended bill in charging that the traffic between St. Louis and Omaha and between St. Louis and Wichita was conducted under substantially similar circumstances and conditions, stated a mere conclusion of law; whereas it should have charged the detailed facts, so that the court, on considering the bill alone, could have determined therefrom whether or not the circumstances and conditions under which such traffic was conducted were "substantially similar."

Fourth. Because there was an adequate remedy at law for the wrongs complained of.

POINTS AND AUTHORITIES.

I.

THE DEMURRER ADMITS A VIOLATION OF THE LAW.

II.

THE PURPOSE OF THE ACT WAS TO COMPEL EQUALITY OF TREATMENT, TO PROVIDE A NEW REMEDY AND PRESERVE ALL EXISTING REMEDIES.

Interstate Commerce Commission v. Railway, 167 U. S., 479.

III.

PROCEEDINGS BEFORE THE COMMISSION ARE NOT EXCLUSIVE OF OTHER REMEDIES.

State ex rel. Matoon v. Railroad, 17 Neb., 648.
State ex rel. v. Telephone Co., 17 Neb., 126.
Lowry v. Railroad, 46 Fed., 86.
Railroad v. Railroad, 47 Fed., 771, 774.
Vincent v. Railroad, 49 Ill., 33.
Sutherland Stat. Const., Sec. 202.
Smith v. Stevens, 10 Wall., 321, 326.
United States v. County of Macon, 99 U. S., 590.
Mayor of Nashville v. Railway, 19 Wall., 475.

Thomas v. West Jersey R. Co., 101 U. S., 52.
South v. Maryland, 18 Hun, 402.
Hearne v. Insurance Co., 20 Wall., 493.
Amy v. City of Salina, 12 Fed., 414.
Oregon Short Line v. R. R. Co., 51 Fed., 465.
Osborne v. Railroad, 48 Fed., 49; S. C. 52 Fed., 912.
Railway v. Goodrich, 149 U. S., 680.
Kentucky Bridge Co. v. R. R. Co., 37 Fed., 565.
Wright v. United States, 167 U. S., 512.
Attorney General v. Railroad Companies, 35 Wis., 425.
Coal Company v. Coal Company, 88 Am. Dec., 537 (note).
2 *Morawetz on Corporations*, Sec. 1132.
Cumberland Valley R. R.'s App., 62 Penn. St., 227.
Sparhawk v. Railroad, 54 Penn St., 421.
State ex rel. v. Saline County Court, 51 Mo., 350.
State ex rel. v. Calloway County, 51 Mo., 395.
High on Injunctions, Secs. 1303, 1304, 1554.
Interstate Commerce Commission v. Railway, 167 U. S., 479.

IV.

EVEN IF THE COMMISSION HAS EXCLUSIVE ORIGINAL JURISDICTION OF COMPLAINTS MADE BY INDIVIDUALS, THE RULE DOES NOT APPLY TO THE GOVERNMENT.

Savings Bank v. U. S., 19 Wall., 239.
Swearingen v. U. S., 11 Gill & J., 373.
Commonwealth v. Baldwin, 1 Watts, 54.
United States v. Hoar, 2 Mason, 314.
People v. St. Louis, 5 Gilman, 351.
In re Debs, 158 U. S., 564.

V.

SECTION 12 SPECIALLY AUTHORIZES THIS SUIT.

Sutherland Stat. Const., Sec. 240.
Wilkinson v. Leland, 2 Pet. 627, 632.

VI.

REMEDIES SUMMARIZED.

VII.

CASES IN WHICH MANDATORY INJUNCTIONS HAVE BEEN GRANTED.

Great North. R. R. Co. v. R. R. Co., 1 Coll., 507.
Earl v. G. N. R. R. Co., 10 Hare, 664.
Corning v. Troy Rail. Co., 40 N. Y., 391.
Storer v. Great W. R. R. Co., 2 Y. & C., 48.
Wilson v. Furnace Co., L. R. 9 Eq., 28.
Sanderson v. Cockermouth Co., 11 Beav., 497.
Great Nor. Co. v. Manchester Co., 5 DeG. & S., 138.
Green v. West. C. Co., L. R. 13 Eq., 44.
Hood v. N. E. Co., L. R. 8 Eq., 666, on appeal.
Commonwealth v. Eastern, 103 Mass., 259.
Harris v. Cockermouth Co., 3 C. B., N. S., 693.
Mariot v. London Co., 1 C. B., N. S., 489.
Vincent v. C. & A. R. R. Co., 49 Ill., 37.
District Attorney v. Ry Co., 16 Gray, 442.
Atty. Gen. v. Boston Wharf Co., 12 Gray, 553.
Atty. Gen. v. Lee Co., 104 Mass., 244.
Atty. Gen. v. Cohoes Co., 6 Paige, 133.
Atty. Gen. v. R. R. Co., 1 Stock, 526.
Commonwealth v. R. R., 24 Penn. St., 159.
Georgetown v. Canal Co., 12 Pet., 98.
Atty. Gen. v. Street Ry. Co., 14 Grant (V. C.) Ch. 673.
Commonwealth v. R. Co., 24 Penn. St., 159.
Atty. Gen. v. Ry. Co., 1 D. R. & S. M., 154, 161, 162.
Atty. Gen. v. Leicester, 7 Beav., 176.

VIII.

EQUITY IS EQUAL TO EVERY EMERGENCY.

2 Red. on Rail., Sec. 205.
Taylor v. Simon, 4 Myl. & C., 14.
More v. Malachy, 1 Myl. & C., 559.
Wolworth v. Holt, 4 Myl. & C., 619-635.
Munn v. Ill., 94 U. S., 113.
Chicago, etc. Ry. Co. v. Ry Co., 47 Fed., 24.
Gay v. United States, 138 U. S., 1.
Atty. Gen. v. R. R. Companies, 35 Wis., 425.

IX.

THAT THERE MAY BE A REMEDY AT LAW TO PERSONS FOR DAMAGES IS NO DEFENSE TO THIS SUIT.

Atty. Gen. v. R. R. Co.'s, supra.
United States v. Baker, 1 Paine, 156.
12 United States Digest (first series) b. 745.

X.

THE BILL DOES NOT PLEAD CONCLUSIONS OF LAW.

The argument that the traffic between St. Louis and Omaha, and between St. Louis and Wichita was conducted under similar circumstances and conditions is one of fact, and not of law.

Commission v. Railway, 168 U. S., 144.
Daniell's Chan. Pl. & Pr., Vol. 1, *6th Am. Ed.*, p. 369.
Story Equity Pl., Sec. 253.
Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S., 194.
Interstate Commerce Commission v. Alabama Mid. R. Co., 168 U. S., 144.
Louisville & N. R. Co. v. Behlmer, 175 U. S., 648.

XI.

ALTHOUGH STRICTLY SPEAKING, THERE IS NO NATIONAL COMMON LAW; AND EVEN IF CARRIERS HAVE THE RIGHT AT THEIR OWN RISK TO MAKE RATES WHICH ARE PRESUMPTIVELY LAWFUL, YET THESE FACTS DO NOT AFFECT THIS CASE.

Interstate Commerce Commission v. Ry., 168 U. S., 144.

ARGUMENT.

I.

THE DEMURRER ADMITS A VIOLATION OF THE LAW.

Bearing in mind that the defendant, by its demurrer, admits that it has been and is charging and collecting from consignors and consignees of all kinds of freight between St. Louis, Mo., and Wichita, Kansas (a distance of 458 miles), more than twice as much as it has been and is charging and collecting for the same service between St. Louis and Omaha (a distance of 501 miles); and remembering, also, that it is likewise admitted that all this business was conducted "*contemporaneously and under similar circumstances and conditions,*" and for about one-half the distance over the same track, attention is invited to the provisions of the statute on which the bill is based.

Section one of "An Act to regulate commerce" provides:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in any connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section two provides:

"That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and condi-

tions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Section three provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The amended bill shows a plain and flagrant transgression of these three sections of the law. It further shows, that by such transgression, injury is done to the entire public tributary to or dependent on Wichita as a distributing point. From the bill it is certain that injury is done to a large part of the people of Kansas, Colorado and Oklahoma Territory by the violations of the act complained of; yet it is wholly impossible to estimate the damage to each person. It is shown that defendant is violating a public law to the injury of the public, that it is engaged in a business in which the public are interested; and that the injury complained of is irreparable. If the complainant is entitled to sue at all, the bill exhibits a case for equitable relief.

II.

THE PURPOSE OF THE ACT WAS TO COMPEL EQUALITY OF TREATMENT, TO PROVIDE A NEW REMEDY, AND PRESERVE ALL EXISTING REMEDIES.

The evils sought to be remedied by this statute are matters of general and public knowledge as a part of the history of the times, and are plainly set forth in the act itself.

The purpose of congress was to regulate common carriers engaged in interstate commerce, to provide another remedy for the evils of which there was such loud complaint, and as stated by this court, to secure to all shippers equality of treatment.

Interstate Commerce Commission v. Railway, 167 U. S., 479.

The act prohibits the charging of unreasonable rates for the transportation of passengers or property, or for receiving, delivering, storing or handling such property.

It places all persons upon an equality for like and contemporaneous service in the transportation of like kind of traffic under substantially similar circumstances and conditions. Unequal charges, whether greater or less, are prohibited and declared to be unlawful.

Undue or unreasonable preference or advantages to any person, or any particular description of traffic, are declared to be unlawful; and it is likewise declared to be unlawful to subject any *locality*, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage whatsoever.

Applied to this case these are the principal evils for which the act seeks to provide a remedy. The interstate commerce commission was created for the purpose of aiding in enforcing these provisions; and one course of procedure which may be followed under the act is to file a complaint before the commission against any common carrier who violates its provisions; *but this course is not exclusive, and other methods of procedure and other remedies are provided.*

Section 9 provides:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the commission as hereinafter provided for, or may bring suit in his or their own benalf for the

recovery of the damages for which such common carrier may be liable, under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of such remedies and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

There is no way in which this provision can be interpreted in harmony with the construction of the act contended for by the appellant. The act says that any person may make complaint to the commission, or may bring suit for damages in the district or circuit courts, but shall not do both. The fact of filing a complaint before the commission would be a complete defense to an original action in the circuit or district courts for the same injury.

Here are two remedies provided by the act for the redress of a private injury. Either may be followed, but not both.

The amendatory act of March 2, 1889, (25 Stat. L. 855) provides:

"That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ."

The amendment further provides that the remedy by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by the act, or the act to which it is a supplement. It has already been seen

that the original act carefully preserved all remedies existing by common law or by statute.

It is a settled rule of statutory construction that all parts of a statute must be construed together, and if possible, all must be given force and effect. Under the construction contended for by appellant, an application for a writ of mandamus could not be made under the provisions of the amendment to the act just quoted, unless the person applying for the writ had first submitted his grievance to the commission.

If the act is construed according to the plain import of its language, it does not seem possible to reach the conclusion contended for by appellant's counsel.

Under the provisions of section 9, and also under the provisions of the amendatory act of March 2, 1889, there is no room to doubt that proceedings may be instituted in the courts against any common carrier subject to the provisions of the interstate commerce act for a violation of its provisions, by any person who has been injured, without first making complaint to the commission. Further, it is clear that if complaint is first made to the commission, then the remedy must be sought through that channel alone; and in such case, the courts can be reached only through the commission—a direct appeal to the courts being prohibited.

If the argument of the appellant is sound, the provisions of the law which preserve all existing remedies, and make the remedies provided by the act cumulative, have no meaning.

If congress intended to regulate every one having a grievance against a carrier to the commission; if the act (Sec. 13), in declaring that every person, etc., *may* apply to the commission by petition; if the act in providing that the commission, on its own motion, *may* investigate violations of the law; or if the permissive authority granted by section 16, to the effect that any person *may* apply to a court to enforce an order of the

commission, bars all other relief, then *all* violations of the law *must* first be submitted in the commission, *and the party aggrieved must depend for his remedy on the commission finding in his favor; for if such finding be adverse to him, whether just or unjust, he is without further remedy—the philosophy of the argument being that the courts have jurisdiction only to enforce the findings of the commission.* Suppose the case of the court declining to enforce a finding—then the aggrieved party would again be without any remedy whatever.

Such a construction would nullify a great part of the act, and strike down some of the most effective remedies therein provided. It would be a mockery to hold that the tedious and futile process required by such a construction would provide for the injured party "an easy, speedy and inexpensive" remedy.

III.

PROCEEDING BEFORE THE COMMISSION ARE NOT EXCLUSIVE OF OTHER REMEDIES.

The position upon which defendant mainly relies is that the circuit court had no jurisdiction; that the matters complained of must be submitted to, and passed on, by the commission before that court could protect rights secured by, or redress or prevent violations of, the interstate commerce act. We have not been able to find any case in which a federal court has passed on this precise question. In the able brief submitted on behalf of the appellant in the circuit court of appeals the only case cited which is at all in point is *State ex rel. Moore, et al. v. Railroad Co.*, 27 N. W. Rep., 437, decided by the supreme court of Nebraska. That was a petition for a mandamus to compel the defendant to stop its trains and to build such suitable depots, sidetracks, switches and cattle guards

on its line of railroad at North Side as would reasonably accommodate the public and conform to the requirements of the law. The court held that under the act of the legislature of Nebraska, which took effect June 6, 1885, creating a railway commission, the relator had a plain and adequate remedy at law which did not exist prior to the taking effect of said act, and on that ground denied the writ. The case shows very little investigation or consideration, and in view of the fact that the same court, prior to this decision, had decided that the writ of mandamus was a proper remedy in such cases, the correctness of this decision may well be doubted, even if there was nothing in the Interstate Commerce Act to make it inapplicable. The same tribunal, prior to the act creating the railroad commission in that state, had passed upon the same question in *The State ex rel. Matoon v. Railroad*, 17 Nebraska, 648, in which case, after full argument, it is squarely decided that the court had power and jurisdiction by mandamus to compel railways as common carriers to furnish suitable warehouses or depots at all appropriate points on their lines for the receipt and discharge of passengers and freight.

This decision was placed upon the ground that the right to build and operate a railroad, and to charge and take tolls and fares, is a prerogative granted by the state; that public utility is the consideration for such grant, and although a railroad franchise may be in the hands of a private corporation, it is still a sovereign franchise and must be used and treated as such, and must be held in trust for the general good.

It is also held that in the use of such franchise all citizens have an equal interest and equal right, and all must, under the same circumstances, be treated alike, without unjust discrimination against any.

The court further decided that the duty thus imposed grew out of and rested upon the principles of the common law, and might be enforced in the absence of statutory requirements.

See also *The State ex rel. v. The Nebraska Telephone Co.*, 17 Neb., 126, where the authorities are quite fully collated.

The last case cited was one in which the relator had applied to be admitted as a subscriber of respondent, and was refused. Relator tendered a full compliance with all the rules of the company, his place of business was accessible, and no reason was shown why his request should not be granted. It was held that the telephone is a public servant in the commerce of the country, and that respondent, having undertaken to supply the demand, must supply all alike, without discrimination, and that having undertaken to supply the demand in the City of Lincoln, wherein relator resided, and being fully able to furnish him with a telephone instrument the same as its other subscribers, it was its duty to do so.

The decision relied on by appellant is in direct conflict with the well settled rule of statutory construction. The act creating the commission in that state did not make the remedy provided thereby exclusive, and the court before its passage had decided that there was a remedy existing at common law.

Turning to the "Act to regulate commerce," it is found that Sec. 22, as amended, among other things, provides:

"And nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies."

In commenting on this provision in the case of *Lowry v. Railroad*, 46 Fed Rep., 83, at page 86, the court said:

"The law would have been the same independently of this provision. The rule is that where a statute gives a remedy

in the affirmative (without a negative, express or implied) for a matter which was actionable at common law, this does not take away the common law remedy, but the party may still sue at common law as well as upon the statute."

JUDGE HAMMOND, in discussing the question of jurisdiction in the case of *Railroad v. Railroad*, 47 Fed. Rep., 771, 773, 774, said:

"The argument for the demurrer proceeds, however, upon the theory that the jurisdiction of the court here is limited by the provisions of the Interstate Commerce Act prescribing certain remedies which may be taken in this court for its enforcement. It is hardly necessary to decide that question; but, if it be, there can be but little doubt that the plenary jurisdicion of this court to entertain all controversies arising under an act of congress, either at law or equity, has not been abbreviated by this act in relation to controversies arising under it, but the special remedies so far as they are special are merely supplementary to the ordinary remedies existing under the subsisting judiciary act which governs all our jurisdiction. This is fairly inferable, if not directly decided, from the decision of Circuit Judge Jackson, just cited, (*Kentucky & Indiana Bridge Co. v. Railroad*, 37 Fed., 567, 615); and in my judgment there can be no doubt of this, whether it has been so decided or not. Whatever jurisdicion a court of equity may entertain of this controversy may be entertained here, if not under the regulations of the interstate commerce act, prescribing certain remedies, then under the judiciary act, giving us the power of an equity court as to all cases and controversies arising under any act of congress."

See also *Sutherland on Stat. Const.*, Sec. 202.
Vincent v. Railroad, 49 Ill., 33.

The act itself, however, plainly shows that Congress did not intend to deprive anyone—much less the government—of any remedy then existing. By authorizing the procedure before the commission, congress intended to create another remedy for the benefit of the citizen; it intended to bring into existence another tribunal with power to abate the evils the law denounced—with jurisdiction to decide that a wrong ex-

isted, and the right to appeal to the courts to prevent disobedience of its order.

The rule enunciated in Sections 204, 325, 326, of *Sutherland on Statutory Construction* do not affect the question. The author, in those sections discusses, first, the distinction between *affirmative* and *negative* statutes; and, second, the application, in the construction of statutes, of the maxim, *expressio unius est exclusio alterius.* The class of statutes referred to in Sec. 204 of his work is well illustrated in *Smith v. Stevens,* 10 Wall., 321, 326, (one of the authorities cited by the author). There congress had provided a method of sale of lands granted to certain Indians. The court held that the act "by necessary implication, prohibited their sale in any other way." But that is a totally different proposition from that advanced by the appellant, which is that because Congress granted parties the right of proceeding before the commission it thereby deprived them, *and also the government,* of all other remedies.

In the other sections the author touches only that class of statutes in which the legislature, dealing with matters not before recognized in the law, enacts that certain things may be done on the happenings of certain contigencies. For example, this court, in *United States v. Ranscher,* 119 U. S., 407, after stating that the common law did not permit the surrender by one government to another of fugitives from justice, held that the Ashburton treaty forbade the extradition of a person for a crime not mentioned therein. That is to say, the treaty by stating that for either one of seven crimes extradition might be had, did not mean that it could be had for other crimes not named.

United States v. County of Macon, 99 U. S., 590.
Mayor of Nashville v. Ray, 19 Wall., 475.
Thomas v. West Jersey R. Co., 101 U. S., 52.
South v. Maryland, 18 How., 402.
Hearne v. Insurance Co., 20 Wall., 493.
Amy v. City of Salina, 12 Fed., 414.

It is unnecessary, perhaps, to add other authorities, as those already cited utterly demolish the "special tribunal" theory of the appellant. The rule contended for is contrary to the general practice of the courts. It is a matter of general and common knowledge that suit after suit has been brought under the provisions of the Interstate Commerce Act without first submitting the matters complained of to the commission. Actions in replevin have been brought to recover goods from railroad companies, (after a tender of what was considered to be reasonably due for the transportation of such goods) on the ground that the freight and charges demanded by the railroad companies were unreasonable. Injunction suits against railroad companies have been commenced by other railroad companies and by private parties, and no doubt was suggested or expressed as to the jurisdiction of the court, in an original suit, to grant an injunction to prevent violations of the Interstate Commerce Act, where the averments of the bill, or the facts established by the proof, showed that the act was being violated. In *Oregon Short Line and Utah Northern R. R. Co., v. Northern Pacific R. R. Co.*, 51 Fed. Rep., 465, a mandatory injunction theretofore issued to enjoin defandant from unlawfully discriminating against complainant was dissolved on the ground that no unlawful discrimination was shown. No question whatever was raised as to the jurisdiction of the court, or as to injunction being the proper remedy where a case of unlawful discrimination was shown. (See, also, Judge Deady's dissenting opinion, page 477.)

Osborne v. Railroad, 48 Fed., 47, s. c., 52 Fed., 912.
Railroad v. Railroad, 47 Fed., 771.
Union Pac. Ry. Co. v. Goodridg's, 149 U. S., 680.
Kentucky, etc. Bridge Co. v. Railroad, 37 Fed., 565.

On page 627 of the case last cited, it appears that the question of rates had not been passed upon by the commission,

but the court, notwithstanding that fact, took up the question and decided it.

Independent of the well settled rule that the government is not limited to the special remedies provided by statute, unless by the express terms of the act, and of the practice of the courts that the remedy for a violation of the act is not confined to a proceeding before the commission in the first instance, and then by application to the courts to enforce the finding of the commission, the language of the act plainly provides for a direct and original application to the court; it provides for and authorizes suits for damages, and writs of mandamus independent of the commission; *and it is only where a person seeking redress has complained to the commission that he is prohibited from seeking in the courts, in the first instance, his remedy for the same injury.*

The argument that the commission has exclusive original jurisdiction of all matters or questions arising under the act, applies with as much force to section 9, which authorizes a suit for damages to be brought, where complaint is not first made to the commission, and also to the amendatory act of March 2, 1899, which authorizes any person to apply for a writ of mandamus, as it does to any other provision of the act.

If the position of appellant that the commission has original exclusive jurisdiction of all matters growing out of the act is true as to the act generally, it is none the less true as to section 12, under which the present suit is brought.

But what we claim is, that it was the purpose and intention of Congress to provide and afford every possible remedy known to the law for the enforcement of the provisions of the act. All the terms of the act plainly show this. The violation of its provisions is made a crime, and no one would be bold enough to contend that the commission must first determine

whether any person was guilty of a criminal offense, as defined in the act, before he could be indicted and tried for such offense. (*Wright v. United States,* 167 U. S., 512.) The fact that a violation of the provisions of the act is made a crime, shows how fixed was the intention of Congress to use every means within its power to secure its enforcement.

The act provides that complaints may be made to the commission. It provides that the commission may institute inquiries independent of complaints. It authorizes the commission to apply for a writ of mandamus to compel a common carrier subject to the provisions of the act to comply with the provisions thereof, and it provides that the commission may apply for a writ of injunction to restrain such common carriers from doing business until they comply with the act. It provides that where an order or finding is made by the commission, and such order or finding is not complied with, the commission, or any person interested in the order or finding, may apply to the proper circuit court, sitting as a court of law or as a court of equity, as the case may be, to enforce the finding or order.

It provides that in case any common carrier subject to the provisions of the act shall do, cause to be done, or permit to be done, any act, matter or thing in the act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in the act required to be done, such common carrier shall be liable to the person or persons injured thereby, for the full amount of damages sustained in consequence of any such violation, together with a reasonable counsel or attorney's fee, to be fixed by the court, and taxed as costs in every case of recovery.

The act leaves it in the discretion of any person who claims to be damaged by any common carrier subject to its provisions, to proceed either by way of complaint to the com-

mission, or by suit in his own behalf for damages, in any district or circuit court of competent jurisdiction. The only limitation is, that both the complaint to the commission and suit for damages shall not proceed in the same case.

Section 9 refers to distinct and separate remedies, one by way of complaint to the commission, and one by way of action for damages in the court. Its language is:

"But such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt."

The act further provides that the circuit and district courts shall have jurisdiction upon the relation of any person or persons, firm or corporation alleging a violation by a common carrier of the provisions of the act, to issue a writ of mandamus against such common carrier; and that seperate, distinct and independent remedies were intended to be provided, and were provided, by the act, is shown in the plainest possible manner by the proviso to the amendatory act of March 2, 1889, which is as follows:

"*Provided*, That the remedy hereby given by the writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act, or the act to which this is supplemental."

The language is, "shall not be held to exclude or interfere with other remedies," not remedy.

How can the conclusion be avoided that "An act to regulate commerce" provides separate, distinct and independent remedies, and that for violations in certain instances, one and only one remedy is to first make complaint to the commission?

The contention that the United States, by the act in question, is denied the power or right to prosecute this suit, and that the matter complained of could only be brought to the at-

tention of the courts after it had been presented to the commission, is a concession that but for the act the suit could have been maintaned. In other words, the claim is that the mandate of the constitution (Art. 2, Par. 3) "that the president shall take care that the laws be faithfully executed," if not abrogated, was limited and restricted when congress exercised its constitutional right to regulate commerce among the states. He who puts forth such a claim ought to be able to sustain it by clear and specific authority.

It may be conceded that the commerce act erected a new code of duty for carriers, and forbade certain practices permissible at the common law. But this premise does not at all support the conclusion that because congress called the commission into being, and clothed it with certain administrative and quasi-judicial powers, the duty of other officers of the government to enforce *all* the laws, by any recognized or competent method, was changed. The fallacy of the position of the appellant is clearly exposed by assuming the statute to exist as it reads, minus those parts that create the commission and define its powers and duties. In that case the argument concedes the right to correct the wrongs complained of in the manner attempted by this bill.

The force of these considerations is not impaired by the quotations from the commission printed in appellant's brief in the lower courts. The statement that the commission was created to exercise the constitutional power conferred on congress to regulate commerce does not admit that that power was *exclusively* conferred; nor did the commission, by pointing out that the act created a new standard of right and wrong, give either aid or countenance to the theory that that standard could only be enforced in one manner.

It is equally aside the question that the commission has taken cognizance of claims for damages growing out of viola-

tions of the act, or that this is the first instance in which that body has requested the law department of the government to bring suit in the name of the United States to restrain defiance of the law. It might, with equal force, be argued that the right did not exist because congress did not exert its power to regulate commerce for more than an hundred years, or that the courts are without power to restrain frauds on the patent office because it has been the custom to leave citizens injured thereby to redress their own wrongs.

It is, perhaps, unnecessary to additionally show that the position of appellee is also impregnable in the light of the decided cases. At the risk, however, of being prolix, we have concluded to show, as briefly as possible, that the right assumed rests on indubitable and controlling authority.

In *Attorney General v. The Railroad Companies*, 35 Wis., 425, the attorney general of the state filed an information in the supreme court for an injunction to restrain certain railroad companies for excess or abuse of corporate franchises, and a violation of public law, to the public detriment.

The case was elaborately argued, and the question of the right to an injunction, as a remedy for the wrongs complained of, was fully discussed and considered, both in the briefs and the lengthy and able opinion of the court.

It was argued that there was an adequate remedy at law, by way of an information in the nature of *quo warranto*, to forfeit the charter of the corporation.

In reply to that argument, the assistant attorney general, on behalf of the state, said:

"The argument that there is a remedy at law, is answered in several English cases, as follows: The information in the nature of *quo warranto* to forfeit the charter of a corporation, is in the nature of punishment, and the proceeding was formerly regarded as strictly criminal, and is still *quasi* criminal. But the remedy by injunction is for the prevention of injury,

and not for punishment. As argued by Sir Samuel Rumley, in *Att'y Gen'l v. Cleaver,* 18 Ves., 214: 'The ground of the application is not that the act is a crime, but that it occasions irreparable injury to several persons. The defendants, in order to succeed, must establish the principle that because the act is a crime, it is entitled to favor and protection in a court of equity.' "

Here follows a long list of citations; and following the citations, the argument proceeds:

"It is to be collected from all these cases, that where the exercise of powers and privileges not granted by law to a corporation works a public injury, equity, at the suit of the attorney general, will restrain the repetition of such acts, but will not interfere at the suit of the attorney general, where only private interests are affected; and that in these latter cases, the writ is denied, not because the court has no jurisdiction, but because no proper cause is made out for its exercise." (pp. 507, 508.)

RYAN, C. J., in delivering the opinion of the court, says:

"But equitable jurisdiction of such information was denied. It was argued that courts of equity had no jurisdiction at the suit of the attorney general to enjoin usurpation, excess, or abuse of corporate franchises.

"This question was argued very ably and at large, and has been carefully considered, although we had no difficulty in coming to the conclusion that courts of equity have such jurisdiction, and that it is a very beneficial jurisdiction, almost essential to public order and welfare." (p. 532.)

* * * * * * * * * *

"But if this court can enjoin, it can do so without regard to any remedy at law; and the attorney general has a right of election to resort to the more lenient remedy of injunction, in preference to the harsher and more dangerous experiment of forfeiture. (p. 524.)

"*When any corporation is doing acts detrimental to the public welfare, or hostile to public policy,* the right of the attorney general to interfere on these grounds was fully established in *Attorney General v. Great North. Ry. Co.,* where the defendants had engaged in an illegal trade in coals. It was objected that it was not competent for him to file an information. But Kindersley, V. C., says: 'On this point I entertain no doubt whatever. Whenever the interests of the public

are damnified by a company established for any particular purpose by act of parliament, acting illegally and in contravention of the powers conferred upon it, I conceive it is the function of the attorney general to protect the interests of the public by an information; and that when, in the case of an injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the act creating it, it is competent for the attorney general, in cases of injury to public interests from such a cause, to file an information for an injunction.' "

The jurisdiction of the court was maintained on purely equitable grounds, and it was argued and shown that the courts of England did not exercise jurisdiction in such cases in consequence of any statutory provisions, but squarely upon the general rule governing and controlling courts of equity. (Pages 525 to 528.)

In Mr. Freeman's note to the case of *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.*, 88 Am. Dec., 537, he draws the distinction between a bill in equity to compel a corporation to perform its duties to the public, and a suit to restrain a corporation from violating its charter and public duties, or to enjoin it from committing a public nuisance. He says:

"While suits of the latter class," (*i. e.* to restrain a corporation from violating its charter and its public duties, or to enjoin it from committing a public nuisance) "are unquestionably maintainable, and are in fact very common, the power of courts of equity to entertain suits of the former class is not so certain."

In the same note is a quotation from the opinion of Lord Cairns, in the case of *Att'y Gen'l v. Mid-Kent Ry.*, L. R., 3 Ch., 100, as follows:

"It was pressed upon us that there was a sufficient remedy at law by mandamus, and that where there is a sufficient remedy at law this court does not interfere by way of injunction. It is true that in many cases where the injury has been trifling, where there has been improper delay, or where the in-

jury is transitory, this court has left the complainant to his remedy at law. That was on the ground that there were two concurrent remedies, an action for damages and a suit for an injunction, and that damages would meet the justice of the case. Here the argument is, that the attorney general could obtain from a court of law a mandamus having the same effect as a mandatory injunction, and that we are to refuse to interfere in a case where the court clearly has jurisdiction, merely because the same relief can be had in another court.

"Ordinarily, a bill in equity is not the proper remedy to compel a corporation to perform its public duties. But if a corporation should threaten to violate a duty which it owes to the public, any member of the public who would suffer an immediate injury, for which there is no adequate remedy, may restrain the threatened wrong by injunction. So the state may sue in equity to prevent a corporation from violating its duties to the injury of the public, if there is no other practicable remedy."

2 *Morawetz on Corporations*, Sec. 1132.
Cumberlands Valley Railroad's App., 62 Pa. St., 227.
Sparhawk v. Union Passenger Ry., 54 Pa. St., 421.
State v. Saline Co. Court, 51 Mo., 350.
State v. Calloway Co., 51 Mo., 395.
High on Inj. (2nd Ed.) Secs. 1303, 1304, 1554.

In *Interstate Commerce Commission v. Railway*, 167 U. S., 479, it is ruled that the powers of the commission are judicial and administrative, but not legislative, and that it has no power, after determining judicially that an existing right is unreasonable, to prescribe a rate to control the future, and to enforce such right by mandamus. But the court, quoting from the brief of appellees, says: "Article 2, Section 3, of the constitution, ordains that the president shall take care that the laws be faithfully executed. The act to regulate commerce is one of these laws. The first section (of the act to regulate commerce) simply enacted the common law requirement that all charges shall be reasonable and just. For more than one hundred years it has been the duty of the courts to execute and enforce this common law requirement." (p. 501.)

IV.

EVEN IF THE COMMISSION HAS EXCLUSIVE ORIGINAL JURISDICTION OF COMPLAINTS MADE BY INDIVIDUALS, THE RULE DOES NOT APPLY TO THE GOVERNMENT.

Independent of the tact that the act preserves the remedies existing at the time of its enactment, the rule contended for by the appellant has no application to the present suit. It is conceded, as a general proposition, that where a statute creates a right and provides a particular remedy for its enforcement, the remedy is usually exclusive of all common law remedies. But that rule has no application to the government. Where the government interferes to protect public rights, it is limited, neither as to the remedy it will pursue nor the tribunal to which it will resort, unless the express words of the statute impose a limitation.

In *Savings Bank v. United States*, 19 Wall., 227, 238, 239, 240, Justice Strong states the rule with great force and clearness. He says:

"It must also be conceded to be a rule of the common law in England, as it is in Pennsylvania and many of the other states, that where a statute creates a right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common law remedies. But it is important to notice upon what the rule is founded. The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and it is enforced when any one to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other. But by the Internal Revenue law, the United States are not prohibited from adopting any remedies for the recovery of a debt due to them which are known to the laws of Pennsylvania. The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not for the government. They may be obliga-

tory upon tax collectors. They may prevent any suit at law by such officers or agents. But they are not rules for the conduct of the state. It is a familiar principle that the king is not bound by any act of parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests. (Magdalene College Case, 11 Reports, 74; *King v. Allen,* 15 East, 333.) He may even take the benefit of any particular act, though not named. (Case of a Fine Levied, etc., 7 Reports, 32; Pott. Dwarris, 151, 152.) The rule thus settled, respecting the British crown is equally applicable to this government, and it has been applied frequently in the different states, and practically in the federal courts. It may be considered as settled that so much of the royal prerogative as belonged to the king in his capacity of *parens patriae,* or universal trustee, enters as much into our political state as it does into the principles of the British constitution. * * * The reason of the rule which denies to others the use of any other than the statutory remedy is wanting, therefore, in applicability to the government, and the rule itself must not be extended beyond its reason."

Whatever rights or remedies existed in favor of the state or sovereignty in controlling common carriers or enforcing such regulations prior to the passage of the Interstate Commerce Act still exist in favor of the United States. Every presumption is in favor of the government. A statute will not be construed to limit or restrict the government, unless the express words of the enactment require it. It is a settled rule of the English law that the king may sue in what court he pleases, and it is a settled rule in the United States that such parts of the royal prerogative as pertain to the king as *parens patriae* are apportioned between the states and the general government.

Savings Bank v. U. S., 19 Wall., 239.
Swearingen v. U. S., 11 Gill. & J., 373.
Commonwealth v. Baldwin, 1 Watts, 54.
United States v. Hoar, 2 Mason, 314.

It is upon the principle that the state or the government is the universal trustee for its citizens, that suits to protect

public rights are authorized and instituted. Obstructions placed in navigable streams are abated by injunction on suit of the United States. Such obstructions, by interfering with commerce, are held to be public nuisances. The right to enjoy the benefits of interstate commerce is a right common to each and every citizen of the United States. It is a public right, within the control of congress, and when the instrumentalities engaged in such commerce proceed in violation of the laws of the United States regulating interstate commerce, to the public injury, the United States, as *parens patriae,* as the universal trustee of the citizens, has a right to interfere to prevent a violation of the public law to the public injury, such right is inherent in sovereignty. And where it has such a right, unless limited and restricted by the express words of the statute, the government cannot be limited in the choice of remedies.

The writ of injunction has been a recognized remedy in a suit on behalf of the state to prevent corporations from violating public laws to the public injury; and it is impossible to perceive why it is not appropriate to enforce the regulations which congress has provided for common carriers engaged in interstate commerce. Where the violation of the law affects a whole community, not only in one state, but in several states, as shown in the present bill, where it affects a large portion of the people of the state of Kansas, and of the Oklahoma territory, and of the state of Colorado, the present proceeding is the only one which affords a plain, speedy and adequate remedy.

Section 3 of the act prohibited the defendant from subjecting the "locality" of Wichita "to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The bill shows and the demurrer admits a violation of this provision of the law. Opposing counsel say the only way in which the admitted unlawful act of their client may be re-

strained is for some one who has actually suffered a pecuniary loss by reason thereof to apply to the commission to inquire into it. According to the logic of this argument the United States must even await a finding by the commission that the act has been violated before proceeding by criminal prosecution to punish the offender, and that it is helpless to vindicate the law in a civil proceeding, because the public treasury has not been despoiled. The predicate of this position apparently is, that at common law the appellant might charge the same man twice as much for hauling a bushel of corn from Wichita as it charged him for transporting it from Omaha—the distance, conditions and circumstances and cost of the carriage being the same in each instance. We deny the truth of the predicate—but admitting it, and assuming that the commerce act alone forbids such a palpable discrimination—it ought not to be and it is not true that the government is so barren of power, so destitute of authority, as to be unable to enter the portals of its own courts and demand process to prevent gross wrong to the inhabitants of a *locality,* in respect of a matter wholly within the purview of national law. Such a narrow view of governmental power is wholly inadmissable. To say that the United States must look within the covers of the commerce act for authority to enforce the provisions thereof is the same as saying that the government has no authority to enforce a statute except that which it confers upon itself by written law. The establishment of such a doctrine would wholly pervert the function of government. The provisions of the commerce act which this suit seeks to enforce against the defendant are well within John Austin's famous analysis—*i. e.* it is a *command* issued by a superior to a subject. The government alone can enforce that command, in respect to the facts before the court. The "*locality*" of Wichita is not a legal entity that can go into court to collect damages for or to prohibit discrimination practised on its denizens by the defendant carrier.

No individual—even if he has the right—can adequately redress the wrong complained of. The commission may inquire into it, but is powerless to abate it, except through the courts. Assuming—as the court must—that the law has been violated in the "locality" described in the amended bill, how otherwise than by such a proceeding can the wrong be adequately prevented in the future? This is not an attempt to judicially establish rates—it is not an attempt to interfere with the primary right of the defendant to determine the price at which it shall transport over its lines the products of the farms of Kansas and Nebraska—it is simply an effort by the plaintiff to prevent the defendant from charging the Kansas farmer twice as much per ton per mile for hauling his cattle as it charges the Nebraska ranchman for hauling his. To contend that the United States has no power to prevent such conduct—forbidden as it is by positive enactment—is to argue that our government is destitute of the one power that is indispensable to its existence. If it has not this power, it will and ought to die. We believe it was Austin who said that the existence of government, with power to enforce its laws, is necessary to the conception of society. And that this power is inherent, and does not require to be written in each law as it is enacted, or in any law at all, is self-evident. The exercise of this power for the advantage of the whole or a part of the people, or rather the degree in and the vigilance and energy with which it is so exercised, is the test by which the worth of the government should be measured. As said by many writers, the enforcement of law is a duty which the sovereign power must, of absolute necessity, take upon itself. That duty is not conferred by statute—it is an attribute of government. This is true within any definition of the term ever asserted or formulated. Even Herbert Spencer's restricted conception of the functions of government conceded that its essential duty was to protect the citizen in his right to life, personal liberty and property.

The late Mr. Justice Bradley, in his article "Government," (Vol. 3, Supp. Ency. Brit.) holds that "civil society can only exist where the rules made for the conduct of its members are forcibly carried out. * * * It is of the essence of civil society to be governed by rules that are enforced, and rules can not be enforced without some agency to enforce them, and that agency we call government." The learned writer proceeds, from this text, to unfold his conception of government and its powers; but nowhere does he express doubt of its inherent power to enforce law, or anywhere suggest the necessity of an enabling act such as opposing counsel have argued is necessary to the maintenance of this suit.

To proceed by way of the commission would cause great delay, and if the averments in the bill are true, irreparable injury; irreparable both because of the magnitude of the injuries inflicted, and because it is impossible to estimate them in damages.

After the commission has passed upon the question, the case would be no nearer the end than before, for such findings would still require a proceeding in the courts for their enforcement, which would subject the citizen to unreasonable delay, and result in a practical denial of justice. There is no adequate remedy by a suit for damages on the part of individuals. Every citizen of that portion of the United States in any way tributary to Wichita, by the exorbitant charges of defendant, is damaged to a greater or less extent, the amount of which no one can definitely state. So it is an invasion of a public right which is intrusted to the keeping of complainant; and complainant, as trustee of such right, is warranted and justified in interfering to prevent appellant from violating such rights as are conferred and secured by the act.

It is insisted, first, that there is no plain, speedy and adequate remedy at law; and second, that complainant is not limited by that rule, when it interferes to protect a public

right or prevent public injury, where such right is intrusted to its keeping.

Savings Bank v. United States, supra.
Attorney General v. Railroad, supra.

If the United States has any rights as against appellant, or is charged with any duties to the public in enforcing the Interstate Commerce Law, or in preventing the violation of such law to the injury of the public, whatever remedies may exist for such enforcement, or to prevent such violation, are open to it, independent of any question of an adequate remedy at law, and independent of the existence of any special tribunal.

"Injunction will lie to prevent threatened acts which would amount to a public or private nuisance, although a legal remedy exists by criminal prosecution."

People v. City of St. Louis, 5 Gil., 351.
Savings Bank v. United States, supra.
Attorney General v. Railroad Companies, supra.
In re Debs, 158 U. S., 564.

While we insist that there is no adequate remedy at law for the injuries complained of in the bill, yet in a suit on behalf of the government, the fact that there is a remedy at law constitutes no defense. These rules do not apply to sovereignty. Whatever, in the statute, may be construed to confer rights, or to give authority to complainant, will be construed in its favor; and there being no express words prohibiting it from maintaing such a suit, nothing can be construed against it, under the statute in question; and whatever remedies may be applied for the prevention of the wrongs set forth in the bill, choice of such remedies is open to complainant. This would be true as applied to the government, if the statute itself was silent; but by the plain language thereof such remedies are preserved.

In *re Debs,* 158 U. S., 564, sets at rest the question of the right of the United States to maintain this suit. As is well known that was a suit, brought as this was, (except that the commission did not request it) in the name of the United States. The defendants there were charged with obstructing interstate commerce and the transportation of the mails. The supreme court unanimously upheld the jurisdiction, and applauded the action of the officials who invoked the peaceful authority of the courts rather than the mailed hand of force. Mr. Justice Brewer, after showing the exclusive authority of the general government over interstate commerce, and pointing out that congress had passed a variety of acts in relation to such commerce—notably the act and its amendments here involved—says: (page 581.)

"As, under the constitution, power over interstate commerce and the transportation of the mails is vested in the national government, and congress, by virtue of such grant, has assumed actual and direct control, it follows that the national government may prevent any unlawful and forcible interference therewith. But how shall this be accomplished? Doubtless, it is within the competency of congress to prescribe by legislation that any interferences with these matters shall be offenses against the United States, and prosecuted and punished by indictment in the proper courts. But is that the only remedy? Have the vast interests of the nation in interstate commerce and in the transportation of the mails, no other protection than lies in the possible punishment of those who interfere with it? To ask the question is to answer it."

After stating that the freedom of such commerce may be enforced by criminal prosecution or by the exercise of physical force, and showing the possibility that the evil would not thereby be effectually remedied, he proceeds: (page 582.)

"The existence of this right of forcible abatement is not inconsistent with, nor does it destroy, the right of appeal, in an orderly way, to the courts for a judicial determination, and an exercise of their powers, by writ of injunction and otherwise, to accomplish the same result."

The following is sufficient answer to the position of appellant that the complainant has no interest in the subject matter of the suit: (page 583.)

"Neither can it be doubted that the government has such an interest in the subject-matter as enables it to appear as party plaintiff in this suit."

And, says the learned justice: (page 584.)

"Every government, intrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interests of all and to prevent the wrong doing of one, resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court."

After citing *U. S. v. San Jacinto Tin Co.*, 125 U. S., 273, and *U. S. v. American Bell Telephone Co.*, 128 U. S., 315, to show that the doctrine is not a new one, it is said: (page 586.)

"It is obvious from these decisions that while it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against another, yet, whenever the wrongs complained of are such as effect the public at large, and are in respect of matters which by the constitution are intrusted to the care of the nation, and concerning which the nation owes the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or prevent it from taking measures therein to fully discharge those constitutional duties."

With marked approval the opinion quotes from 133 Mass. these words: (p. 589.)

"The rights of fishing, boating, bathing and other like rights which pertain to the public are regarded as valuable rights, entitled to the protection of the government. • • •

If a corporation or an individual is found to be doing acts without right, the necessary effect of which is to destroy or impair these rights and privileges, it furnishes a proper case for an information by the attorney general to restrain and prevent the mischief."

And this from *Gilman v. Philadelphia*, 3 Wall., 713 (p. 590):

"Wherever commerce among the states goes, the power of the nation, as represented in this court, goes with it, to protect and enforce its rights."

In summarizing the conclusions arrived at it is said: (p. 599.)

"We hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that, while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty, that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority."

The functions of the commission are administrative and judicial, not legislative; (*Interstate Commerce Commission v. Railway*, 167 U. S., 479) and yet it is claimed that the national government—the power that created the commission—the repository of the constitutional grant of power—by conferring

these functions upon the commission—robbed itself of the right to act directly—was guilty of self spoliation—and is now helpless to restrain the perpetuation of lawless acts by carriers, and powerless to protect the public in the enjoyment of that equality of treatment that congress declared it should enjoy. Clearly this contention is untenable.

V.

SECTION 12 SPECIALLY AUTHORIZES THE SUIT.

It will be seen from the foregoing that no single remedy was intended by congress, but that every remedy that the law could afford was intended to be provided.

It is submitted that the distinct and independent remedies hereinbefore pointed out are plainly provided for by the act. And, in addition thereto, section 12 gives a further remedy, and that is the remedy sought to be applied by the pending suit. Section 12 provides:

"That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the object for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act; *and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply, to institute in the proper courts, and to prosecute under the direction of the attorney general of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States,*" etc.

It is said that the power conferred on the commission by section 12 does not enlarge the power given by previous sec-

tions to primarily investigate the facts, and to enforce the provisions of the act by applying to a court to enforce an order already made. But if that be so, the italicised part of section 12 was unnecessary, for without it, the commission had all the power yielded to it by counsel. If the purpose was to exclude every one, including the United States, from complaining to the courts direct—if the only basis of a suit is an order made by the commission—then the act would be as complete without the last half of section 12 as with it, and congress stands convicted of inserting in the act language that is entirely redundant and useless. If the appellant is right, the courts must disregard a part of the law, and ignore the canon of construction that requires all parts of a statute to be given meaning and effect.

Sutherland Stat. Const., Sec. 240.
Wilkinson v. Leland, 2 Pet., 627, 632.

We confess our inability to comprehend the argument that suits of this character will deny carriers the "equal protection of the laws." And admitting that this suit is novel and unique, in the sense that it is the first of its particular kind, we might retort that inasmuch as the commission is a body with power only to gather information and report it to congress, some new process of enforcing equal treatment of communities by common carriers is necessary, if not indispensable. As the appellant, at the same time, and under similar circumstances, asserts the right to charge twice as much for transporting commodities and live stock an equal or less distance over one of its lines, than it charges on another of its lines, there ought to be a right in the government itself to institute a judicial inquiry as to such a glaring and shocking discrimination.

VI.

REMEDIES SUMMARIZED.

We have now a remedy by a public prosecution; a remedy by a complaint to the commission and an application to the courts for an enforcement of the findings and orders of the commission; a remedy by the independent action and findings of the commission, and then an application to the courts by the commission for a mandamus and injunction to enforce the same; a remedy by way of action for damages on the part of any person or persons claiming to be damaged by any common carrier subject to the provision of the act, by reason of such carrier violating any of its provisions; a remedy by an application of any person, persons, firm or corporation, alleging a violation by a common carrier of any of the provisions of the act, for a writ of mandamus; and in addition to each and all of these, by the terms of the act, all remedies at common law, or by statute, which existed at the time of the passage of the act.

VII.

CASES IN WHICH MANDATORY INJUNCTIONS HAVE BEEN GRANTED.

A mandatory injunction was granted in the following cases:

To pull down a wall which it had unlawfully erected, *Great North. R. R. Co. v. Clarence R. R. Co.*, 1 Coll., 507.

To stop all its trains at a certain station, *Earl v. G. N. R. R. Co.*, 10 Hare. 664.

To restore a stream of water to its natural channel, *Corning v. Troy Rail. Co.*, 40 N. Y., 391.

To erect a right-of-way on plaintiff's premises, *Storer v. Great W. R. R. Co.*, 2 Y. & C., 48.

To make a carriage-road and maintain a wharf, *Wilson v. Furnace Co.*, L. R., 9 Eq., 28.

To make necessary slips and rights-of-way for cattle, *Sanderson v. Cockermouth Co.*, 11 Beav., 497.

To permit the plaintiff to run its cars in such a manner as will be necessary for the safety and speedy conveyance of passengers and goods along the defendant's railway, and to furnish plaintiffs all such other conveniences as plaintiff had been accustomed to use, *Great Nor. Co. v. Manchester Co.*, 5 DeG. & S., 138.

To construct and maintain a permanent siding, *Green v. West C. Co.*, L. R., 13 Eq., 44.

To construct and maintain at a specific point a first-class railway station, and to supply it with the necessary rooms and conveniences, to be determined by the court at chambers, and to stop every passenger train thereat, to set down and take up, and, therefore, to transport passengers, *Hood v. N. E. Co.*, L. R., 8 Eq., 666; on appeal, 5 Chan. App., 525; *Commonwealth v. Eastern*, 103 Mass., 259.

To carry coals for plaintiffs on equal terms with others, *Harris v. Cockermouth Co.*, 3 C. B. N. S., 693.

To permit the omnibus of plaintiff, an express carrier, to enter the yard of a railway station for the purpose of receiving, forwarding and delivering from and upon their said railway in the same manner and to the same extent as the railway vehicles, *Mariot v. London Co.*, 1 C. B., N. S., 489.

To deliver grain in bulk without charging the plaintiff five dollars per car for so doing, *Vincent v. C. & A. R. R. Co.*, 49 Ill., 37.

See also *District Attorney v. Lynn & Boston R. Co.*, 16 Gray, 242; *Attorney General v. Boston Wharf Co.*, 12 Gray, 553; *Attorney General v. Tudor Ice Co.*, 104 Mass., 244; *Attorney General v. Cohoes Co.*, 6 Paige, 133; *Attorney General v. Hudson River R. R. Co.*, 1 Stock, 526; *Georgetown v. Alexan-*

dria Canal Co., 12 Peters, 98; *Attorney General v. Toronto Street Rly. Co.*, 14 Grant (U. C.), Ch., 673; *Commonwealth v. Pittsburg & Connellsville R. Co.*, 24 Penn. St., 159; *Attorney General v. Great Northern Rly. Co.*, 1 D. R., & S. M., 154, 161, 162; *Attorney General v. Leichester*, 7 Beav., 176.

VIII.

EQUITY EQUAL TO EVERY EMERGENCY.

These authorities show that equity has the power and that it is its duty, as was said by Lord Cottingham, to—

"Adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all those new cases which from the progress daily taking place in the affairs of man must continually arise, and not from too strict an adherence to the forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy."

2 *Red. on Rail.*, Sec. 205.
Taylor v. Simon, 4 Myl. & C., 14.
Mare v. Malachy, 1 id., 559.
Wolworth v. Holt, 4 id., 619-635.

They also show that it is not a matter of moment that no exact precedent can be found for a case precisely like this, because the business is of recent origin, of rapid growth, of great importance, and concededly one in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well-established principle in social science; and the case simply extends the law so as to meet a new development of commercial progress. There is no attempt to compel the railway to grant the public an interest in its property, but simply to observe its obligations to the public.

Munn v. Illinois, supra.

As was remarked by Mr. Justice Brewer, in *Chicago, Rock Island & Pacific Rly. Co. v. Union Pacific Rly Co.*, 47 Fed. Rep., 24:

"The powers of a court of equity do not end with the day. If the changed conditions of affairs twenty years hence shall make the full use of its tracks and facilities necessary to the Pacific for the transaction of its business and the discharge of its duty to the government, the powers of a court of equity are equal to the emergency. * * * I have come to the conclusion that sufficient to the day is the evil thereof, and strong enough and adequate for to-morrow are the powers of a court of equity. It is at least clear that the government, * * * whenever its rights are disturbed, may interfere and compel as against everybody the full discharge of its duties by the Pacific."

And as said by Mr. Justice Blatchford, in *Joy v. St. Louis*, 138 U. S., 1:

"Railroads are common carriers, and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public in the progress of trade and traffic by new methods of intercourse and transportation." (p. 50.)

And Mr. Justice Brewer further remarked, in his opinion in the case in 47 Fed. Rep., *supra*.

"But I believe most thoroughly that the powers of a court of equity are as vast and its processes and procedure as elastic as all the changing emergencies of increasing complex business relations, and the protection of rights, can demand. * * * The powers and processes of a court of equity are equal to any and every emergency. They are potent to protect the humblest individual from the oppression of the mightiest corporation; to protect every corporation from the destroying greed of the public; to stop state or nation from spoliating or destroying private rights; to grasp with strong hand every corporation, and to compel it to perform its contracts of every nature and do justice to every individual." (p. 20.)

Mr. Justice Bradley, in his article "Law," published in the American supplement to the Encyclopedia Brittanica, referring to this subject, says that this

"Flexible and expansive quality of a nation's jurisprudence is not only an interesting, but a highly important and essential feature of the law. * * * Throughout the national life this inexorable law will be found to prevail, that as the mutual relations of men in society multiply and controversies increase, the laws will expand to embrace them. * * * This principle of adaptation and expansion does not depend upon, and does not generally wait for, specific legislation, although often aided and supported by it. It arises from the fact that law is not merely a verbal rule, but is a concrete expression of justice as applied to the transactions of society. * * * To stop this expansion of the law would be equivalant to stopping the growth and advancement of society and the very pulse of humanity."

Certainly there is as great a public interest involved in this suit as in the cases of *Joy v. St. Louis* and *Railroad v. Railroad* from which the above quotations are taken.

The learned chief justice, in *Atty. Gen. v. R. R. Co's.*, 35 Wis., 425, *supra*, quotes further from Brice, as follows:

"The above being the grounds of the jurisdiction of the court of chancery in this behalf, the next point is, when can the attorney general direct proceedings on behalf of the government? *He may do so whenever public interests have been damnified, or will manifestly be damnified in the result by transactions which are now taking place.*"

This case was decided in 1874, prior to the memorable decision in the case of *Munn v. Illinois*, 94 U. S., 113. This latter case was decided in March, 1877, and squarely determines that—

"When private property is devoted to a public use, it is subject to public regulation."

The power over corporations by way of injunction, as heretofore shown, rests on the doctrine that corporations, *in the performance of duties owing by them to the public, are*

public functionaries. The same reasoning applies to any private property or business "affected with a public interest." Whenever the government has authority to regulate, unquestionably it has authority to enforce its regulations. And where it has authority to enforce its regulations, it has the right to choose the remedies it sees fit to employ. All common carriers engaged in interstate commerce are subject to the control and regulation of congress. The right to control or restain such agencies from violating their public duties, by way of a suit for an injunction on behalf of the government, existed long prior to the passage of "An act to regulate commerce." It was a remedy granted by courts of equity in the exercise of their equitable jurisdiction. It was not the creature of any statute, but is inherent.

Quoting again from the opinion in *Attorney General v. Railroad Companies*:

"We have been unable to find any English statute enlarging the jurisdiction of the court of chancery in such cases; and we find all the English cases proceeding without reference to statutory jurisdiction. We find no room for doubt that this jurisdiction of English courts of equity is independent of all authority by statute, and has long been as well recognized as any ground of equitable jurisdiction whatever." (35 Wis., 526.)

And by the terms of the act, as such a remedy was known and exercised prior to its passage, it still exists, and may be applied as against common carriers engaged in interstate commerce, to prevent a violation of their public duties, and to prevent irreparable injuries to the public.

Can there be any doubt that congress had in mind this very remedy when it provided in section 12:

"Upon the request of the commission, it shall be the duty of any district attorney of the United States, to whom the commission may apply, to institute in the proper court, and to prosecute under the direction of the attorney general of the

United States, all necessary proceedings *for the enforcement of the provisions of this act*, and for the punishment of all violations thereof?"

Opposing counsel have said that this suit is anomalous and exceptional, etc. The remark would not have been indulged in if counsel had given the subject more mature consideration. It is true that it may be the first suit on behalf of the government, in which an application for an injunction is made under "An act to regulate commerce." But the practice of preventing, by injunction, a violation of public duties on the part of agencies "affected with a public interest," or which owe duties and obligations to the public is by no means either anomalous or exceptional. The remedy here applied for existed before the act, as a power inherent in courts of equity, and it is preserved by the plain language of the act.

IX.

THAT THERE MAY BE A REMEDY AT LAW TO PERSONS FOR DAMAGES IS NO DEFENSE TO THIS SUIT.

It is asserted that the government cannot maintain this suit because individuals who are damaged by the discriminations complained of may sue for damages, and because the amendatory act of March 2, 1889, gives to certain persons the right to apply for writs of mandamus in the cases therein mentioned. It will be observed that in said amendment congress was careful to again reiterate its purpose of preserving all existing remedies that could be invoked by citizen or government for the enforcement of the great principle of equality which tried to find expression in this statute. The language is:

"That the remedy hereby given by writ of mandamus shall be cumulative, *and shall not be held to exclude or interfere with other remedies provided by this act, or by the act to which it is a supplement.*"

The remedy provided by said amendatory act is at the suit of a private person to redress a private injury. The present suit is on behalf of the public, to prevent a public injury, which is irreparable by reason of its continuing character, and that the damages occasioned are estimable only by conjecture, and not by an accurate standard.

Further than that, it is insisted, that when the government interferes for the protection of public interests, it has a right to the choice of whatever remedies there may be.

Quoting again from the case of *Attorney General v. Railroad Companies, supra*:

"It was hardly denied that the English court of chancery entertains jurisdiction in such cases; and indeed the English books leave little room for such a denial.

"But it was said that, in England, the attorney general has a right to elect his forum, legal or equitable. And it is so said in some of the cases. (*Attorney General v. Mayor of Galway,* 1 Molloy, 103.) But it appears to us that this logically follows, everywhere, upon equitable jurisdiction to restrain corporate violations of charters or other public laws. In such cases there is always a remedy at law. The attorney general may proceed at law by *quo warranto* to forfeit the charter of the offending corporation, and, if there be a penalty, as often happens, he may sue for it at law. And the concurrent remedy by injunction inevitably gives the election imputed to the attorney general. And we see no reason why the attorney general here has not the same election. To deny him such an election is only another way of denying the jurisdiction.

"The equitable jurisdiction precludes the objection that there is an adequate remedy at law. It admits the remedy at law, but administers its own remedy in preference when the state seeks it in preference." (35 Wis., 523, 524.)

"A state, as a political corporation, has a right, independent of any statutory provision, to institute a suit in any of her courts, whether it be required by her pecuniary interest or the general public welfare." (*People of the State of Illinois v. St. Louis,* 5 Gilman, 351.)

"An act of congress is not necessary to enable the United States to sue. It can sue in its own name like an individual, unless a different method is prescribed by law."

United States v. Baker, 1 Paine, 156.

A common carrier engaged in interstate commerce is performing a public office, or engaged in a business "affected with a public interest," and is subject to the laws and regulations of the United States.

X.

THE BILL DOES NOT PLEAD CONCLUSIONS OF LAW.

This objection to the bill was not urged in the circuit court. It is not found in the assignment of errors. The fifth paragraph of said assignment charges that the circuit court erred in restraining appellant from continuing to charge unreasonable rates, etc., because the court assumed, without proof, or sufficient allegation, that the defendant had charged unjust rates.

In the ninth paragraph the same objection is made in respect of the decree assuming that the service between St. Louis and Omaha and St. Louis and Wichita were carried on under substantially similar circumstances and conditions. These objections were not presented to the circuit court of appeals, but it was urged in the brief filed in that court, that the bill fails to comply with the rules of good pleading in the above respect. We are not called upon to reply to this part of the argument, nor will the court pass upon it. It was not presented to or passed on by the circuit court, and the rule, and the repeated decisions of this court, require *all* errors relied on to be specified in the assignment of errors.

But counsel are mistaken, not in their premise, but in their conclusion. It is doubtless true that the statement of a conclusion of law is bad pleading. But it is purely a question of fact whether the conditions and circumstances under which traffic is conducted are similar or dissimilar. In the amended bill the tariffs fixed by the defendant are set out. They show that the people in the locality of Wichita are charged double

what the people in the vicinity of Omaha are charged for the same service, although the distance between Wichita and St. Louis is 43 miles less than the distance between Omaha and St. Louis. It is also shown that the traffic passes over the same rails for about one half the distance. This is followed by averments that the traffic was conducted "contemporaneously, and under similar circumstances and conditions." If, as must be conceded, these are matters of fact, it was no more necessary to state the hours at which freight trains departed from Wichita or Omaha, than to state, in detail, either the circumstances or conditions under which the freight was transported. If the bill, in this respect, is deficient, it must be because it does not set forth the cost of the service, the relative grades of the two lines westwardly of Holden, the character and volume of business between the respective cities and intermediate points, the different lines of railroad that compete for that business, the creation and maintenance by the railroad companies of so-called basing lines, the potential influence of the Missouri river as a means of transportation between St. Louis and Omaha, and other like considerations. But all of these are matters of fact and not of law, and it is no more necessary to plead them than it would be the reasons why a tract of land was worth a specific sum of money, or that a lump sum of money claimed as damages was made up of different items of loss, or any other matter of evidential character.

No authority was cited by opposing counsel in support of this branch of their argument, but it is believed that the bill meets the tests laid down by the books. Daniell's Chan. Pl. & Pr. (Vol. 1, 6th Am. Ed. p. 369) says that it is only necessary "to give the defendant full information of the case which he is called upon to meet," and Story (Eq. P. Par. 253) states that general certainty is sufficient in pleadings in equity. In 3 Ency. Pl. & Pr. 355, it is said:

"A general charge or statement of a matter of fact is sufficient, and it is not necessary to charge minutely all the circumstances that may conduce to prove the general charge. These circumstances are properly matters of evidence, which need not be charged to let them in as proof, especially when they are of such a nature as to be peculiarly within the knowledge of the defendant."

The bare averment that the defendant unlawfully discriminated against Wichita would be stating a conclusion of law—the opinion of the pleader upon the facts. But a statement that the defendant discriminated because it charged twice as much to A as it did to B for like service at the same time, and under the same circumstances and conditions, is a statement of substantive facts, and not of law or conclusions of law. It is a statement that an overcharge in a certain amount was made at a stated time for the transportation of a given article, and that the situation as to external circumstances, and the surroundings—the particulars which attended or affected the act—were substantially similar. In *Commission v. Railway*, 168 U. S. 144, after pointing out that the third section of the act forbids the making or giving any undue or unreasonable preference or advantage to any particular locality, without defining the language, and that the fourth section does not define what substantially different circumstances and conditions are, the court remarks that *these are all questions of fact depending on the matters proved in each case.*

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S., 194.

Interstate Commerce Commission v. Alabama Mid. R. Co., 168 U. S., 144.

Louisville & N. R. Co. v. Behlmer, 175 U. S., 648.

XI.

THE FACTS THAT, STRICTLY SPEAKING, THERE IS NO NATIONAL COMMON LAW, AND THAT CARRIERS HAVE THE RIGHT, AT THEIR OWN RISK, TO MAKE RATES WHICH, WHEN MADE, ARE PRESUMPTIVELY LAWFUL, DO NOT AFFECT THE QUESTION.

The propositions above stated were presented by opposing counsel to the courts below at considerable length. But, assuming that the vexed question of what the common law did forbid in the way of discrimination has been correctly answered, and that thereunder a carrier was prohibited only from giving undue advantage to one person or class of persons, it is not perceived that this militates against our position. If, as is admitted by the demurrer, the appellant did violate the statute, it cannot be a matter of moment that, at the common law, no relief could be had for the acts complained of. Nor does the concession qualify or restrict the right of the government to enforce the statute, in the interest of that portion of the public which suffers from the unlawful practices set up and confessed.

The other consideration is equally futile. Doubtless, the appellant had the right to announce the rates it proposed to charge for transportation between the different points on its lines, and to enforce those rates until some tribunal or authority, with power to test and determine their legality, was called on to exercise its authority. The appellant urges that the commission is exclusively clothed with this authority, that the jurisdiction of the courts is purely derivative, and that congress, by clothing the commission with certain duties, impliedly took from the other executive officers of the government the right they otherwise had of compelling public ser-

vants to obey public laws, and perform public duties. The statement of the proposition is its best answer.

In *Interstate Commerce Commission v. Railway,* 168 U. S., 144, the court had this question under consideration. In that case, while it is conceded that the carrier has the right when dissimilar circumstances and conditions are found to exist, to fix its rates so as to meet those conditions, the court distinctly affirms that rates made under such circumstances "are subject to revision by the commission *or the courts,* when it is charged that such rates are unjust or unreasonable, or that they unjustly discriminate." (p. 173.)

The decree of the circuit court should be affirmed.

W. C. PERRY,
Solicitor for Appellee.

JAMES M. BECK,
Assistant Attorney General,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE MISSOURI PACIFIC RAILWAY COMPANY, appellant, *v.* THE UNITED STATES, APPELLEE. } No. 108.

PETITION FOR REHEARING.

The United States respectfully prays the court to grant a rehearing in the suit above entitled, for the reasons and causes following, to wit:

I.

If the appeal in this case had been disposed of solely on the merits of the controversy, a rehearing would not now be asked for by the Government. But as the case was disposed of on the ground that a court of equity had not jurisdiction to entertain the bill for an injunction at the suit of the United States, it is believed to involve consequences of importance far beyond the mere facts and interests directly shown on this record, and therefore to justify a request for a reargument on that point alone.

The power of the Congress to regulate commerce among the several States is supreme, exclusive, and unlimited except by the other provisions of the Constitution.

The defendant is a quasi-public corporation, exercising the public function of transporting commerce between the States, and as such is subject to the regulations imposed by the Congress of the United States for the government of such transportation and of such commerce.

That being so, such regulations as Congress may have imposed by law are by operation of the Constitution and the laws read into the charter of each incorporated common carrier by railroads engaged in such commerce as completely and fully as if such corporations had been originally chartered by Congress, and such regulations had been written in the laws creating them and made conditions precedent to the right of the defendant companies to engage in such transportation.

As the power of Congress to regulate commerce among the States is supreme, its regulations made in pursuance thereof state the terms on which that commerce may proceed, and no one may lawfully conduct interstate commerce upon any terms repugnant to such regulations. If this be true, then any common carrier who violates the regulations provided by Congress for the conduct of such commerce, violates the charter under which only it may lawfully participate in the transportation of such commerce.

Federal courts derive equity jurisdiction from the Constitution, Article III, section 2, and Judiciary Act, 1 Stat., section 16.

1 Bates Equity, 539.
Boyle v. *Zackery*, 6 Peters, 653.
Penn. v. *Wheeling Bridge*, 13 How., 563.
Osborne v. *U. S. Bank*, 9 Wheat., 738.

Equity, as administered by the high court of chancery in England, would, at the suit of the Government, enjoin corporations from violating the law where the public is injured.

Attorney-General v. *Great Northern R. R.* (1 Drury & Smale, 161).
Hare v. *L. & N. W. Ry.* (2 Johns & Hem., 80 Wood, V. C.).
Attorney-General v. *Mid. Kent Ry.* (L. R., 3 Ch., 100).
Buck Mountain Co. v. *Lehigh Co.* (50 Penn. St., 91).
Trust Co. v. *Georgia* (109 Ga., 747).
Penn. v. *Commonwealth* (29 Am. & Eng. cases, O. S., 145).
In re Debs (158 U. S., 564).
Attorney-General v. *Railroads* (35 Wis., 435).
T. A. A. & N. R. R. v. *Penn. Co.* (54 Fed. Rep., 741).

In the case of *Emperor of Austria* v. *Day and Kossuth* (3 De Gex, Fisher & Jones Reports, 217) a bill for an injunction was entertained to prevent the circulation of a large quantity of notes, which, though not in imitation of any notes circulating in Hungary, purported to be receivable as money in Hungary. The

injunction was granted on the ground that the sovereign might sue in his representative character, on behalf of the subjects of his kingdom, to prevent a pecuniary injury which a spurious circulation would inflict upon them.

The experience of recent years has proven the great value of the writ of injunction as an adjunct to government in maintaining the supremacy of the law and in preventing its future infraction. This was perhaps never more satisfactorily demonstrated than in the case of *Debs*, where the jurisdiction was expressly held to exist.

> *In re Debs*, 158 U. S., 564; see p. 599 *et seq.;* and *Ex parte Lennon*, 166 U. S., 548.

In the case of the *Toledo and Ann Arbor Railroad Company* v. *The Pennsylvania Company* (54 Fed. Rep., 730), an original bill in equity was filed in the United States circuit court to enforce the provisions of the third section of the act to regulate commerce. In this case there had been no previous hearing or order of the Interstate Commerce Commission.

On page 749 the court said:

> The subject-matter of this litigation is, therefore, the construction and enforcement of an act of Congress, and the court acquires jurisdiction because of the Federal question involved. That such question is involved I think too plain for serious controversy. It is sufficient to constitute a case for cognizance by a Federal court if it involves but a single ingredient or question dependent on the Constitution

or a law or a treaty of the United States, although it may at the same time involve any other questions that depend on the general principles of law.

Chief Justice Marshall, in *Osborne* v. *Bank* (9 Wheat., 738), considered this point and came to the following conclusion:

* * * * *

It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief.

This opinion was substantially confirmed in *Ex parte Lennon* (166 U. S., 548), where the jurisdiction of the lower court was directly challenged.

In the latter case this court said:

We think the bill exhibited a case arising under the Constitution and the laws of the United States, as it appears to have been brought solely to enforce a compliance with the provisions of the interstate-commerce act of 1887, and to compel the defendant to comply with such act, by offering proper and reasonable facilities for the interchange of traffic with complainant, and enjoining them from refusing to

> receive from complainant, for transportation over their lines, any cars which might be tendered them.
>
> * * * * *

If, as in the Lennon case, in a situation "regulated and controlled by the interstate commerce act" (as the bill leading to the petition expressed it), and in a suit by private parties, without intervention by the Commission, the bill exhibited a case arising under the Constitution and laws of the United States, since it was brought to enforce a compliance with the provisions of that act, much more forcibly, we think, may that theory be advanced in support of action by the Government in a matter of public and general concern, whether or not the Commission has investigated or requested. And if without investigation, but from already known facts, the Commission requests action, that fact alone ought not to deprive the Government of a right which surely it would have possessed if there had been no action whatever by the Commission.

It has been supposed that the specific remedies mentioned in the act to regulate commerce are the only remedies that are open to enforce the provisions of that act. However that may be as to private suitors, it is not true as to the Government. It was settled in *Savings Bank* v. *The United States* (19 Wall., 239) that the rule respecting "exclusive remedy" does not apply to the United States. In that case Justice Strong, in delivering the opinion of the court, said:

> It must also be conceded to be a rule of the common law in England, as it is in Pennsyl-

vania and many of the other States, that where a statute creates the right and provides a particular remedy for its enforcement, the remedy is generally exclusive of all common-law remedies; but it is important to notice upon what the rule is founded. The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule therefore rests upon a presumed statutory prohibition. It applies and it is in force when anyone to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out by the statute, for he is forbidden to make use of any other. But by the internal-revenue law the United States are not prohibited from adopting any remedies for the recovery of a debt due to them which are known to the laws of Pennsylvania. The prohibitions, if any, either express or implied, contained in the enactment of 1866, are for others, not for the Government. They may be obligatory upon tax collectors. They may prevent any suit at law by such officers or agents. But they are not rules of conduct for the State. It is a familiar principle that the King is not bound by an act of Parliament, unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate), affect not him in the least if they may tend to restrain or diminish any of his rights and interests. (*Magdalene College Case*, 11 Coke, 74; *King* v. *Allen*, 15 East, 333.) He may even take the benefit

of any particular act, though not named. (Case of a Fine Levied, etc., 7 Coke, 32; Pott. Dwarris, 151, 152.) The rule thus settled respecting the British Crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal courts. It may be considered as settled that so much of the royal prerogative as belongs to the King in his capacity of *parens patriæ*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution. The reason of the rule which denies others the use of any other than the statutory remedy is wanting, therefore, in applicability to the Government, and the rule itself must not be extended beyond its reason.

See also *Comlth.* v. *Baldwin*, 1 Watts (Pa.), 54.

II.

Because the Attorney-General, irrespective of any request or previous investigation by the Interstate Commerce Commission, is charged with the duty of enforcing the provisions of the "Act to regulate commerce" and to prevent violations thereof, and the quality of the action of that officer in bringing this suit (notwithstanding the averment in the amended bill that he was moved thereto by a request from the Interstate Commerce Commission) ought not to be determined thereby, if the other averments of the amended bill made a case of which the court to which it was addressed could take cognizance. We claim that the admitted averments here did make such a case.

In the Joint Traffic case (Record, No. 84, October term, 1898, p. 48) the bill was filed upon a request of the Interstate Commerce Commission—"they considered the contract, etc., to be in conflict with the act to regulate commerce." The proceedings instituted invoked both that act and the anti-trust law. The case was heard on bill and answer, and the statement of facts and opinion in this court make no reference to the request of the Commission nor to any previous investigation by them. In point of fact there was a certain investigation, but apparently no finding of facts. At all events, this case, in which by demurrer the facts are admitted and only questions of law are raised, calls for previous investigation and findings by the Commission even less than the Joint Traffic case; for although the issue there was also substantially a pure question of law, viz, whether the agreement violated the Sherman act, yet there was an answer and not a demurrer, and the facts did not pass so completely unchallenged as here.

III.

Because, it is submitted, the majority of the court seem to have been of the opinion that the matters charged in the amended bill were presented to the Interstate Commerce Commission, and that, therefore, it was the duty of that body to investigate such matters; and that it was not within the power of the Commission to transfer the controversy to the courts by requesting the Attorney-General to institute proceedings, whereas the record does not show that said matters were presented to the Commission so that it

became the duty of that body to investigate them, and as a matter of fact no complaint regarding the subject-matter of this case was ever presented to the Interstate Commerce Commission.

IV.

Because this court apparently decided that the "act to regulate commerce" took from the general Government its inherent right to enforce all public laws by civil suit, whereas there is no warrant in the act itself for the conclusion that Congress intended to interfere with or limit the right of the Government to protect public rights in any manner theretofore recognized by law. Because the majority of the court in this case decided generally that the United States has no power by original bill to enforce the "Act to regulate commerce," and thereby in effect overrules *In re Debs* (158 U. S., 564), *Savings Bank* v. *United States* (19 Wall., 227), and *Ex parte Lennon* (166 U. S., 548).

V.

Because a setting aside of the decision and a ruling that the Government had the right to institute and maintain this suit will in nowise conflict with the opinions of this court, in which it is held that in proceedings originating before the Commission, the courts will not proceed to an original investigation of the facts which should have been passed on by the Commission. (*East Tennessee, etc., R. R. Co.* v. *Interstate Commerce Commission*, 181 U. S., 1, and cases cited.) That case simply holds that the court will refuse, if it sees

fit, to exert its original judgment on the facts when it considers that it is entitled to the aid afforded by the previous judgment of the Commission. Here the facts appeared by the demurrer, admitting that the charges were absolutely (not relatively) excessive and unreasonable, as well as discriminatory against the particular point.

VI.

The important question now emphasized was not fully argued in the briefs nor orally before the court. The opinion cites no authorities, and does not discuss the question, but simply states it and disposes of it very briefly by holding that where there is no hearing by the Commission, no finding of fact and no order against the carrier, the law in force at the time did not give authority to bring the suit. The law is contained in sections 13 *et seq.* of the "Act to regulate commerce," as amended by the act of March 2, 1889. Section 13 provides for complaints against carriers by private parties, and makes it the duty of the Commission to investigate if complaints are not satisfied. Section 14 provides that whenever an investigation shall be made, the Commission shall make a report in writing, including findings of fact and its recommendation, which findings are to be *prima facie* evidence as to the facts in all judicial proceedings. This section does not in terms or by implication, we respectfully submit, restrict legal proceedings to a case where there has been investigation; certainly it does not as to suits by the Government as *parens patriæ*. The same contention is true respecting section 15, by which, in case of

investigation, if the Commission finds that a common carrier has committed any injury or damage to a complainant, the carrier shall be notified to desist from violation of law, or to make reparation for the injury. By the sixteenth section, if a carrier does not obey such order, it shall be lawful for the Commission, or for any private party interested, to apply summarily to the circuit court in order that by injunction or mandatory process the carrier may be compelled to obey the order of the Commission. When the Commission files such petition, it is made the duty of the district attorney, under the direction of the Attorney-General, to prosecute the same.

It seems impossible to maintain from this section, giving the Commission a right to enforce its order after investigation and findings of fact, and directing the Attorney-General to aid the Commission to this effect, that this gives an exclusive remedy, and that the ordinary right and broad power of the Government acting through the Attorney-General, to enforce obedience to law by all the usual and proper remedies, legal or equitable, have thereby been withdrawn or curtailed. Nothing else in the law as it existed when this suit was begun, and when it was decided below, can be found to sustain the view that *quoad* the Government, as well as private parties, it cut off previous remedies and substituted an exclusive one. And the Lennon case shows that this court has not attributed to the law this effect even as to private parties.

If the United States is not prohibited from adopting any common law remedy for collecting what is due it,

and if this is true on general principles, as was decided in the case of the Dollar Savings Bank, *ut supra*, with equal or even greater force can it be contended that all equitable remedies are open to the United States. And we respectfully insist that on careful consideration it can not be doubted that although the act to regulate commerce defines the method which the Commission must follow in enforcing the law, nothing in that act, irrespective of the Elkins amendment, limits or was intended to limit the broad, primary, and fundamental power of the Government to invoke all existing remedies, legal and equitable, in performing its public duties and enforcing public rights.

We respectfully submit that a proper case is made out for reargument, and request that the court in its discretion will order the same.

P. C. KNOX,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

WM. A. DAY,
Assistant to the Attorney-General.

We hereby certify that in our opinion the foregoing petition for rehearing is well founded in point of law.

P. C. KNOX,
Attorney-General.
HENRY M. HOYT,
Solicitor-General.

WM. A. DAY,
Assistant to the Attorney-General.

Supreme Court of the United States.

No. 108.—October Term, 1902.

The Missouri Pacific Railway Company, Appellant, *vs.* The United States.	Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[March 9, 1903.]

The original bill of complaint in this cause was filed on behalf of the United States against the present appellant in the Circuit Court of the United States for the second division of the District of Kansas on July 26, 1893. To the bill a demurrer was filed and overruled. (65 Fed. Rep. 903.) Subsequently exceptions were sustained to an answer, and thereafter an amended answer and a replication were filed. The questions now presented for decision, however, were raised by an amended bill filed on July 19, 1897. In such amended bill it was alleged that the suit was brought on behalf of the United States by the United States attorney for the District of Kansas, by the authority of and under the direction of the Attorney General of the United States, and that such authority and direction had been given in pursuance of a request of the Interstate Commerce Commission of the United States "that the United States attorney for the District of Kansas be authorized and directed to institute and prosecute all necessary proceedings, legal or equitable, for the enforcement of the provisions of the interstate commerce law against the defendant in relation to the matters herein complained of." It was further averred in substance that the respondent was subject to the terms and provisions of the act to regulate commerce, and operated lines of railway between the city of St. Louis, in the State of Missouri, and the city of Omaha, in the State of Nebraska, a distance of 501 miles, and between the city of St. Louis and the city of Wichita, in the State of Kansas, a distance of 458 miles. It was charged that in the transportation of freight between St. Louis and said cities of Omaha and Wichita the service was substantially of a like, contemporaneous character, and was made under substantially similar circumstances and conditions, but that, notwithstanding such fact, the rates exacted upon shipments of freight between St. Louis and Wichita very much exceeded the rates charged on freight shipped between St. Louis

and Omaha. It was averred that the collection of such alleged excessive freight rates or any rate of freight on shipments between St. Louis and Wichita in excess of the rate charged for shipments of freight of a similar character and classification between St. Louis and Omaha, operated an unjust and unreasonable prejudice and disadvantage against the city of Wichita and the localities tributary thereto, and against the shippers of freight between St. Louis and the city of Wichita. Averring that the wrongs complained of "are remediless in the premises under the ordinary forms and proceedings at law, and are relievable only in a court of equity and in this form of procedure," the ultimate relief asked was the grant of a perpetual injunction restraining the respondent from continuing to exact a greater rate for transportation of freight of like classification between the city of Wichita and the city of St. Louis than was asked between the city of St. Louis and the city of Omaha. A demurrer was filed to the amended bill upon various grounds, one of which denied the right of the United States to institute the suit.

On hearing, the demurrer was overruled, exception was reserved, and, the defendant electing to stand on its demurrer, a final decree was entered granting a perpetual injunction as prayed, and, on appeal, the Circuit Court of Appeals affirmed the decree, but filed no opinion. An appeal was thereupon allowed.

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The violation of the act to regulate commerce, complained of in the amended bill, was an asserted discrimination between localities by a common carrier subject to the act, averred to operate an unjust preference or advantage to one locality over another. The right to bring the suit was expressly rested upon a request made by the Interstate Commerce Commission to do so, in order to compel compliance with the provisions of the act to regulate commerce relating to the matters complained of in the bill.

Bearing in mind that, prior to the request of the commission upon which the suit was brought, no hearing was had before the commission concerning the matters of fact complained of, and therefore no finding of fact whatever was made by the commission, and it had issued no order to the carrier to desist from any violation of the law found to exist, after opportunity afforded to it to defend, the question for decision is whether, under such circumstances, the law officers of the United States at the request of the commission were authorized to institute this suit?

Testing this question by the law which was in force at the time when the suit was begun and when it was decided below, we are of the opinion that the authority to bring the suit did not exist.

But this is not the case under the law as it now exists, since power to prosecute a suit like the one now under consideration is expressly conferred by an act of Congress adopted since this cause was argued at bar, that is, the act "To further regulate commerce with foreign nations and among the States," approved February 19, 1903. By section third of that act it is provided:

"That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discrimination forbidden by law, a petition may be presented alleging such facts to the Circuit Court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or is being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances upon such notice and in such manner as the court shall direct, and without the formal pleadings and proceedings applicable to ordinary suits in equity. . . ."

And the same section moreover provides as follows:

"It shall be the duty of the several district attorneys of the United States, whenever the Attorney General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided by this act shall not preclude the bringing of suit for the recovery of damages by any party injured or any other action provided by said act approved February 4, 1887, entitled an act to regulate commerce and the acts amendatory thereof."

Although by the fourth section of the act conflicting laws are repealed, it is provided "but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law [italics ours] *and as modified by the provisions of this act.*" We think the purpose of the latter provision was to cause the new remedies which the statute created to be applicable as far as possible to pending and undetermined proceedings brought, prior to the passage of the act, to enforce the provisions of the act to regulate commerce. In the nature of things it cannot be ascertained from the record whether the railroad company now exacts the rates complained of as being discriminatory and which it was the purpose of the suit to correct; but if it does, of course the power to question the legality of such rates by a suit in equity, brought like the one now here, clearly exists. Under these conditions we think the ends of justice will best be served by reversing the decrees below and remanding the cause to the Circuit Court for such further proceedings as may be consistent with the act to regulate commerce as originally enacted and as

subsequently amended, especially with reference to the powers conferred and duties imposed by the act of Congress approved February 19, 1903, heretofore referred to.

The decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause is remanded to the Circuit Court for further proceedings in conformity with this opinion.

Mr. Justice BROWN concurs in the result.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 108.—October Term, 1902.

The Missouri Pacific Railway Company, Appellant, *vs.* The United States.	Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

[March 9, 1903.]

Mr. Justice Brewer dissenting.

I am unable to concur in either the opinion or the judgment in this case.

I think there was no final decree in the Circuit Court, and that, therefore, the Court of Appeals should have dismissed the appeal. After the cause had been once put in issue by bill, answer and replication, a stipulation was filed as follows:

"Whereas, after joining issue upon the pleadings heretofore filed in the above-entitled suit, to wit, the original bill of complaint, the demurrer thereto, the original answer, the amended answer and the replication thereto, it has been determined by all of the parties to, and all of the parties interested in said suit that it is desirable and best that the questions of law arising upon the bill of complaint as amended and a demurrer thereto be first finally adjudicated and put at rest by the Circuit Court of Appeals of the United States and the Supreme Court of the United States;

"Now, therefore, it is hereby agreed and stipulated by and between the above-named complainants, by their solicitors, W. C. Perry and M. Cliggitt, and the above-named defendant, by its solicitors, J. H. Richards and C. E. Benton, that said complainants shall file an amended bill of complaint in said suit, to which said defendant shall file a demurrer, and that, if the court before which said cause is now pending shall overrule said demurrer and allow the relief prayed for in said amended bill of complaint, then said defendant shall proceed to appeal said cause in due course, and that the party, complainants or defendant, against which said Circuit Court of Appeals shall decide adversely, shall, if said party so desires, in due course appeal said cause for final determination to the Supreme Court of the United States.

"And it is further hereby agreed and stipulated that pending said appeal and all the procedure incident thereto the decree and order of said courts, whether it be said Circuit Court of the United States for the District of Kansas, or said Circuit Court of Appeals, or said Supreme Court of the United States, if adverse to said defendant, allowing and decreeing the reliefs and remedies prayed for in said amended bill of complaint, shall be suspended and not enforced against said defendant The Missouri Pacific Railway Company, and when a decision has been rendered in said suit by said Circuit Court of Appeals, or by the Supreme Court of the United States, if the cause is taken to that court, then it is further hereby agreed

and stipulated that the decision and judgment of either or both of said courts, if adverse to said defendant The Missouri Pacific Railway Company, shall be vacated, set aside and annulled and shall not be regarded as of any force or effect against said defendant The Missouri Pacific Railway Company except so far as holding the amended bill to be sufficient, but that said The Missouri Pacific Railway Company shall have the right and shall be permitted to file an answer in said suit, to which said complainants The United States of America shall in due course file a replication thereto, and the issues shall be duly joined and the cause proceed to hearing and determination upon its merits in due course, the intention of this agreement being that the proceedings had upon the demurrer to said amended bill of complaint and the proposed appeal of said suit to a higher court shall in no manner prejudice the right of said defendant to a trial of said suit upon its merits.

"Dated this 16th day of July, 1897.

W. C. PERRY,
MORRIS C. CLIGGITT,
Solicitors for Complainant."

On an application made by the complainant, supported by the affidavit of its solicitor, stating that the defendant consented thereto, an order was entered giving the complainant leave to file an amended bill, and also to the defendant, with consent of the complainant, like leave to file a demurrer. An amended bill of complaint and a demurrer thereto were filed, the demurrer was sustained and, the defendant electing to stand on its demurrer, a decree was entered in behalf of the complainant. A transcript before us shows that all this, from the filing of the stipulation to the entering of the decree, took place on the same day, to wit, July 19. Obviously all subsequently thereto was done in pursuance of the stipulation. That the stipulation was not signed by the solicitors for the defendant is immaterial, as it was for its benefit alone. In the brief for the government in this court, after a statement of preliminary proceedings, it is said:

"It being manifest that the great volume of testimony would have to be taken, and as the defendant had raised the serious question whether the United States could maintain the suit, or had the right, in its own name, and without a preliminary hearing before the Interstate Commerce Commission, to enforce, by injunction, the provisions of the Interstate Commerce Act which forbids discrimination, it was thought best to finally settle that question. Therefore the stipulation on pages 53–54 was entered into. That stipulation provides for the filing of an amended bill, the levelling of a demurrer thereat, and an appeal or appeals to the United States Circuit Court of Appeals and to this court. The amended bill was filed (pp. 55–60); the defendant demurred (p. 61); the court overruled the demurrer, and the defendant, electing to stand on its demurrer, final decree was entered in favor of the complainant. (pp. 62–73.)"

And in the brief for the defendant and appellant it is in like manner said:

"After all this, the parties made the stipulation found on page, 53, to the effect that 'it is desirable and best that the questions of law arising

upon the bill of complaint as amended and a demurrer thereto be first finally adjudicated and put at rest by the Circuit Court of Appeals of the United States and the Supreme Court of the United States," which it was stipulated might be done without prejudice to the right of the defendant if it were held that the bill was maintainable to a trial of the suit upon its merits.

"The amended bill was accordingly filed (Record, pp. 55–60); demurrer thereto was filed (p. 61), and a decree rendered in faver of the complainant."

Now although it may be that the stipulation was not brought into the record by means of a bill of exceptions, and although it does not affirmatively appear that the trial court was made aware of this stipulation, or acted in pursuance thereof, yet as the railway company brings here a record containing the stipulation, and as it is admited by counsel for both parties that it was entered into, and that subsequent proceedings were had in pursuance of its agreements, I think notice should be taken of it by this court. Indeed, if nothing appeared of record, and counsel should admit before us that a stipulation had been entered into between the parties in respect to the finality of the decree, ought we not to act on such admission? Can parties stipulate that questions of law shall alone be presented to this court, and that if our decision be one way the case shall thereafter proceed in the trial court for an inquiry and decree upon the facts? I know that the statutes of some States permit the taking of a case to the appellate court upon a ruling made on a demurrer, but we have always held that the decree or judgment must be final before we are called upon to review it. When a case has once been decided by this court no further proceedings can be had in the trial court except upon our direction, whereas here the parties have stipulated that without such direction a new trial may be had. In other words, our decision is not to be final although we affirm the decree. It seems to me that the decree of the Court of Appeals should be reversed and the case remanded to that court with directions to dismiss the appeal.

Upon the merits, also, I dissent. The bill is an original bill in behalf of the United States, filed under the direction of the Attorney General, and the fact that the Interstate Commerce Commission requested him to cause this suit to be instituted in no manner adds to or affects the question of the government's right to maintain it. The commission was not asking the Department of Justice to enforce any of its orders, in which case, as we held in *East Tennessee, Virginia & Georgia Railway Company* v. *Interstate Commerce Commission*, (181 U. S. 1,) it would become our duty to examine the proceedings had before the commission. This is an independent suit instituted by the government, not to carry into effect any orders of the commission, but to enforce a duty cast upon carriers of interstate commerce, and the right of the government to maintain such a suit does not depend upon the request of any individual or board. The twenty-second

section of the act to regulate commerce provides that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of the act are in addition to such remedies." Every remedy, therefore, that the government or any individual had to compel the performance by carriers of interstate commerce of their legal obligations remains unaffected by that act.

We held in *In re Debs*, (158 U. S. 564,) that the United States had a right, even in the absence of a statute specially authorizing such action, to come into the Federal courts by an original bill to restrain parties from obstructing and interfering with interstate commerce. It seems to me singular that the government can maintain a bill to prevent others from obstructing and interfering with interstate commerce and yet cannot maintain a bill to compel carriers to fully discharge their duties in respect to such commerce. Can it be that the government has power to protect the carriers of interstate commerce and not power to compel them to discharge their duties?

It is said that this is a suit to compel the carrier to refrain from discriminating between places; that there was no common law duty to abstain from such discrimination; that it is forbidden only by statute. But confessedly it was a common law duty of a carrier to make no unreasonable charges. It is distinctly averred in the amended bill (Rec. 57, 59):

"And your orators further aver and show unto your honors that said defendant has established and for a long time has maintained and still maintains in force on the line of its railroad between the city of St. Louis and the city of Wichita rates, rules and regulations governing all freight traffic between said cities over the said railroad which are unjust and unreasonable, in this, that said charges for services rendered by said company in the transportation of property and freight of each and every classification between the said city of St. Louis and the city of Wichita is excessive, exorbitant, unreasonable and unjust to the extent and amount that such rates and charges exceed the rates and charges on the line of said defendant's railroad between the cities of St. Louis and Omaha, all of which is to the great detriment and hindrance of commerce and trade between the said cities of St. Louis and Wichita, and between the localities to which said cities contribute as a supply point, and to the irreparable injury of the public and to the people of the United States.

* * * * * *

"And your orators further aver and show unto your honors that any schedule rates and freight charges for the various shipments and classifications hereinbefore set forth between the said cities of St. Louis and Wichita that are in excess of the tariff schedules and freight charges for shipments of the like kind and class of property between the cities of St. Louis and Omaha are unreasonable, excessive, exorbitant and unjust in and of themselves, and constitute an unreasonable discrimination against Wichita and the localities tributary thereto and the people living therein and against persons shipping freight between the cities of Wichita and St. Louis, and subject such persons and localities to an unjust and unreasonable prejudice and disadvantage."

The truth of these allegations is admitted by the demurrer. The charges for shipments for freight between St. Louis and Wichita are "unreasonable, excessive, exorbitant and unjust in and of themselves." Surely here is a disregard of what was at common law a plain and recognized duty of the carrier.

Further, while at common law a mere difference in the prices charged by the carrier to two shippers respectively might not have been forbidden, yet it may well be doubted whether, if the difference was so great as to amount to an unreasonable discrimination, the rule would not have been otherwise. In *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.*, (145 U. S. 263, 275,) we said:

"Prior to the enactment of the act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, (24 Stat. 379, c. 104,) railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service, (*Fitchburg R. R. Co.* v. *Gage*, 12 Gray, 393; *Baxendale* v. *Eastern Counties Railway Co.*, 4 C. B. [N. S.] 63; *Great Western Ry Co.* v. *Sutton*, L. R. 4 H. L. 226, 237; *Ex parte Benson*, 18 S. C. 38; *Johnson* v. *Pensacola Ry Co.*, 16 Fla. 623,) though the weight of authority in this country was in favor of an equality of charge to all persons for similar service."

But beyond this the interstate commerce act itself forbids unjust discrimination, and such discrimination is also clearly and fully set forth in the bill. Can it be that the government is powerless to compel the carriers to discharge their statutory duties? It is nowhere said in the interstate commerce act that this duty or any other duty prescribed by statute is to be enforced only through the action of the commission. On the contrary, as we have seen, it expressly provides that all other remedies are left unaffected by the act, and a duty cast by statute equally with a common law duty may by the very language of the act be enforced in any manner known to the law.

Further, the act to regulate commerce, as originally passed, in section 16, required the district attorneys of the United States, under the direction of the Attorney General, to prosecute suits to compel carriers to obey the orders of the commission. If all remedies were to be secured only through action in the first instance by the commission that provision was all that was necessary, but in the amendatory act of 1889 (25 Stat. 855) there was added in section 12 this clause: "The commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the

proper court and to prosecute, under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof." Clearly that contemplates just such a case as the present, and when, in the judgment of the commission, it is better that the proceedings should be had primarily in the courts, it may call upon the legal officers of the United States to bring the proper actions.

For these reasons I am compelled to dissent, and I am authorized to say that Mr. Justice HARLAN concurs in this opinion.

True copy.

Test:

Clerk Supreme Court, U. S.